United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

529

NATIONAL WELFARE RIGHTS ORGANIZATION, et. al.,

Appellants,

vs.

No. 23,787

HON. ROBERT FINCH, Secretary, United States Department of Health, Education and Welfare, et. ano.

Appellees.

BRIEF FOR APPELLANTS

Roger L. Rice
National Welfare Rights Organization
1419 H Street, N.W.
Washington, D.C. 20005
Phone: (202)347-7727

Carl Rachlin
James Spitzer, Jr.
General Counsel
National Welfare Rights Organization
140 West 62nd Street
New York, New York
Phone: (212)956-3760

Professor Edward Sparer
University of Pennsylvania Law School
Philadelphia, Pennsylvania

Florence Roisman
416 5th Street, N.W.
Washington, D.C.

INDEX

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Miscellaneous

A. Treatises

Page

B. Reports

C. Legislative Materials

D. Other

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NATIONAL WELFARE RIGHTS ORGANIZATION, et al., Appellants, vs. The Hon. ROBERT FINCH, et Appellee.	No. 23,737

STATEMENT OF ISSUES
~~QUESTIONS PRESENTED~~

1. Whether the United States Department of Health, Education and Welfare may exclude plaintiff-appellants and the poor people they represent from participation in a conformity hearing required by statute to be determined on the record initiated by HEW against Nevada in which plaintiff-appellant have an unquestioned substantial interest and legally recognized and protectable rights accorded to them by the Congress that will inevitably be affected by the outcome of the conformity hearing, and an initimate knowledge of all the facts which affects almost every aspect of their lives and which might not otherwise be brought out at the hearing?

2. Whether, having the interest described above, HEW may limit appellants' participation to the submission of documents and the presentation of an oral argument when other parties whose interests are either adverse or different from appellants' have the right to full participation such as the adducing of

evidence, compelling the production of documents and the attendance of witnesses?

3. Whether judicial review of a determination made by the Secretary of the USDHEW after consideration of the evidence adduced at an administrative hearing required by statute in which appellants were denied the right of full participation is a suitable substitute for full participation in the original administrative hearing, a substitute providing adequate protection for the vindication of recognized and protected rights Congress granted those appellants?

This case was before this court under the same title - No. 23,787. An order was issued granting an injunction pending appeal and expedited argument.

REFERENCES AND RULINGS

This appeal is from the denial of plaintiffs' motion for preliminary injunction. The order denying plaintiffs' motion and the findings of fact and conclusions of law made by the District Judge are appended below as Appendix A.

JURISDICTIONAL STATEMENT

This is an appeal purusant to 28 U.S.C.A. 1292(1) from an order of the District Court denying the motion of plaintiffs-appellants (hereinafter sometimes referred to as "plaintiffs") the National Welfare Rights Organization (hereinafter referred to as "NWRO"), its two Nevada affiliates, and Mrs. Rubie Duncan, a Nevada recipient of Aid to Families with Dependent Children, Chairwoman of one of the Nevada affiliates and a National Coordinating Committeewoman to NWRO for a preliminary injunction. Appendix A. This is an action in the nature of mandamus to compel the defendants-appellees the Secretary of the United States Department of Health, Education and Welfare and the Administrator of Social and Rehabilitation Services of that Department (hereinafter defendants-appelless are sometimes referred to as "defendants" and the Department of Health, Education and Welfare as "HEW") to permit plaintiffs to intervene with the same rights as the other parties in a hearing initiated by defendants pursuant to 42 USCA 604 to determine whether Nevada conforms to Federal requirements inits administration of the Program for Aid to Families with Dependent Children, 42 USCA 601 et seq. (hereinafter referred to as "AFDC"). The conformity hearing against Nevada was originally scheduled for December 9, 1969 but has been postponed indefinitely as a consequence of the decision and order of this court entered on January 2, 1970 enjoining the defendants pending this appeal from holding the hearing unless plaintiffs were accorded the same proecedural rights as HEW and Nevada. That order permits defendants to

continue efforts to bring Nevada voluntarily "into a state of full compliance consistent with the statutory rights of these appellants." APP. B. p. 4.

Jurisdiction of the District Court was invoked pursuant to 28 USCA 1331, 1343, 1361, 2281 and 2288, 5 USCA 701 et. seq., the Fifth Amendment to the Constitution of the United States, the amount in controversy exceeding $10,000 exclusive of interests and costs. Plaintiffs primary reliance was placed on 28 USCA 1361 in that defendants have violated duty owed to plaintiffs by denying them the right to intervene and effectively participate and be heard in a conformity hearing which affects basic legal rights of plaintiffs in contravention of ordinary concepts of "fair play" and the legal and Constitutional requirements contained in Section 554 of the Administrative Procedure Act, 5 USCA 554, and the Fifth Amendment.

STATEMENT OF THE CASE

Plaintiffs-appellants are NWRO, two Nevada affiliates of NWRO, and a Nevada welfare recipient active in the National and Las Vegas Welfare Rights Organizations. The organizational plaintiffs are voluntary membership associations created, controlled and run by welfare recipients for the protection of the rights of welfare recipients and the advancement of the interests of welfare recipients. Plaintiffs have brought this action to protect their substantial legal interests and those of the poor they represent that must inevitably be affected in a hearing scheduled by defendants against the State of Nevada

for failing to have an AFDC program that conforms to Federal requirements.

The Defendant Secretary Finch is required by the provisions of Sections 602 and 1316 of 42 USCA to determine the conformity of each State receiving Federal monies under the AFDC program with the requirements contained in the AFDC program. In execution of his duty, the Secretary through the Defendant Administrator, his designee, has found that Nevada which participates in the AFDC program and receives substantial Federal funds under this program has submitted a "State plan" as required that does not comform. Pursuant to the provisions of Section 602 which is concerned with non-conformity in the administration of the act by the State agency, the defendant Administrator ordered a conformity hearing. On November 14, 1969 Defendant Switzer sent a letter to Karl R. Harris, the Director of the Department of Health, Education and Rehabilitation of the State of Nevada setting a hearing on December 9, 1969 to determine "whether the Nevada State Plan meets requirement of the Federal Law and regulations, and therefore, as to the eligibility of Nevada to continue to receive Federal funds under Title IV, part A of the Social Security Act for the operation of its AFDC program." App. C. pp. 1 & 2.

That letter also stated that HEW anticipated that the hearing would involve the following issues:

> "(1) Whether the State agency has failed to submit a State plan amendment for the Work Incentive Program as required by section 404(a)(19) of the Social Security Act and 45 CFR 220.35. The Social Security Amendments of 1967 (sec. 204(c)(1)

of P.L. 90-248) made the Work Incentive Program mandatory as of July 1, 1968, except for any State prvented by State statute from complying on such date, and mandatory for all states by July 1, 1969.

"(2) Whether the State plan provision for disregarding earned income, which imposed a ceiling on the amount to be disregarded, is in compliance with section 402(a)(8)(A)(ii) of the Social Security Act and 45 CFR 233.20(a)(11)(11)(b) which require, effective July 1, 1969, that the first $30 of total earned income for a month of the individuals specified in such provisions of the law and regulations plus one-third of the remainder of their earned income for the month must be disregarded.

"(3) Whether the State plan provisions with respect to child care services for parents for whom the State agency requires training or employment meet the Federal requirements. The agency will only assist parents to find suitable and adequate child care provided such care can be made available without cost to the State. Under the Federal law and policy, section 402(a)(14) and (15) of the Social Security Act and 45 CFR 220.13(a), child care services must be provided to such persons at agency cost if necessary." Id.

Promptly after learning of the Nevada hearing, Carl Rachlin, General Counsel of NWRO sent on December 1, 1969 a letter to the Defendant Administrator requesting that NWRO be allowed to intervene as a party in the conformity hearing on behalf of itself, its Nevada affiliates and welfare recipients in and out of Nevada. This request was denied but agreed /HEW that because of NWRO's interest they could appear as amicus curiae and submit documents and present an oral statement. See affidavit of Mary Switzer, App. D. This offer was wholly inadequate in view of the fact the hearing was to be an evidentiary hearing and other parties with a no greater interest had greater right.

They had the rights to adduce evidence and to compel the production of documents and the attendance of witnesses, for example, which plaintiffs would be denied.

After HEW refused the request to intervene from NWRO, plaintiffs heard rumors that HEW had reached or was in the process of reaching a clandestine settlement with Nevada Officials disposing of the Matters contained in the Defendants letter of November 14, 1969. Carl Rachlin immediately wired Defendants Secretary Finch and the Administrator Switzer the following message:

> "WE HAVE HEARD THAT NEVADA HAS AGREED TO CONFORM AS TO MATTERS SET FORTH IN LETTER OF NOVEMBER 14 TO NEVADA SETTING HEARING FOR DECEMBER 9 (.) ON BEHALF OF NWRO WHICH HAS A VITAL INTEREST IN THESE PROCEEDINGS IF THE ABOVE IS TRUE WE URGENTLY REQUEST THAT NO ORDER OF ANY KIND OR ANY SETTLEMENT AGREEMENT BE MADE UNLESS NWRO AND THE PERSONS IT REPRESENTS BE PERMITTED TO BE HEARD WITH THOSE RESPONSIBLE ON BEHALF OF HEW FOR ORDER OR SETTLEMENT AGREEMENT(.) SIGNIFICANT ISSUES OF CONFORMITY WHICH RELATE TO MATTERS SET FORTH IN YOUR LETTER OF NOVEMBER 14 MAY NOT BE ADEQUATELY CONSIDERED AS TO ALL RIGHTS OF RECIPIENTS MAY WE HEAR FROM YOU DIRECTLY." App. C ~~*~~ exhibit 10

As in the case of the letter of December 1, 1969, Defendants refused this request as "inappropriate" and postponed the hearing until January 6, 1970 to attempt to resolve the issues involved in the hearing. Letters of Twiname and Mary Switzer, December 4 and 9, 1969. App. C. exhibits 5 and 11.

This hearing in which defendants so adamantly refuse to allow plaintiffs fully to participate will determine two things: (1) Whether the Federal government will continue to make grant-in-aid payments to Nevada under the AFDC program; (2) Whether,

and to what extent, Nevada provides certain minimum, basic rights and protections which Congress mandated for the benefit and protection of welfare recipients. The enormity of plaintiffs' stake in the outcome of the hearing is hard to overstate.

If Federal grants to the State were discontinued, there is little doubt that Nevada could not shoulder the full burden of providing the same assistance now provided. Throughout the country, state officials have raised the hue and cry to have the Federal government assume all the costs. On the other hand, the cut-off of Federal funds is one of the principal devices authorized by the Congress for the protection of these rights Congress afforded poor people. HEW's failure to make use of it and instead to authorize Nevada to continue to flout Federal law by refusing to institute any Work Incentive Program with proper safeguards deprives welfare recipients of their basic rights. Plaintiffs, here, want a work incentive program which provides them access to meaningful and gainful employment and which safeguards them from demeaning and unfair State compulsory work laws as required by Federal law.

The Nature of the Hearing

The defendants initiated this hearing against Nevada pursuant to the provisions of 28 USCA 604(a) which provides that "if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan (detailing the administration of AFDC payment within the State) finds--*** in the administration

of the plan there is a failure to comply substantially with any provision required by Section 602(a) to be in the plan... the Secretary shall notify such State agency that further payments will not be made to the State...." Section 1316(4) of 42 US Code provides that "the findings of fact by the Secretary if supported by the substantial evidence, shall be conclusive." The Regulations of HEW provide that hearings shall be conducted in accordance with the requirements of the Administrative Procedure Act. 45 CFR 201.5(d).

In sum, the hearings will be evidentiary-type hearings, the Secretary will make findings of fact based on the record, and the findings must be supported by the substantial evidence in the record. In the language of the Administrative Procedure Act this is a "case of adjudication required by statute to be determined on the record after opportunity for an agency hearing." Section 554.

In past hearings before HEW and its predecessor agencies, evidence was adduced, witnesses were examined and cross examined, in general the rules of evidence were applied, and the parties were allowed to make objections based on them. This was the procedure In the matter of Alabama State Board of Pensions and Security, Docket No. CR-1, held on October 21, 1965 to determine compliance pursuant to Section 602 of the Civil Rights Act of 1964. HEW called as a witness for them the Commissioner of the State Department of Pension and Security. ~~Both were~~ He was questioned about factual matters relating to discrimination in the program. This was the same procedure used

in a conformity hearing against Louisiana in 1960.

Plaintiffs here desire the same rights which the others will have to determine the conformity of Nevada in its administration of the AFDC program. They desire this because of the nature of the issues involved and because of the effect of the outcome of the hearing on every aspect of their lives. Plaintiffs want full compliance with Federal laws designed for their benefit to the extent that the issues have an immediate effect on them.

Without attempting to limit the issues which plaintiffs wish to raise at the hearing or the evidence they might submit to meet the arguments and evidence of other parties, there are certain facts which plaintiffs now believe are essential to obtaining true compliance on the issues to be determined at the hearing and on which they wish to adduce evidence.

Plaintiffs wish to show at the hearing that existing work provisions enforced by Nevada do not provide for the protections guaranteed by the Federal work incentive provisions which are preemptive of less restrictive State regulations. Plaintiffs also wish to show at the conformity hearing a divergence between the work provisions contained in the Nevada State Plan and the work provisions as they are actually administered. The administration of these provisions removes safeguards for recipients that the State plan as submitted on paper to HEW would indicate are provided. This demonstrates the need for according plaintiffs full rights at the hearing including the right to discovery. There is a need to examine

that State plan, to obtain copies of all work regulations for the State, and to present evidence of a further divergence in the administration of the plan by calling witnesses and presenting other evidence. Even though the State plan may indicate that those not suitable for employment or for a particular employment will not be required to accept such employment as mandated by Federal law, plaintiffs will attempt to show at the hearing if allowed to participate that in the administration of the program this requirement is flouted and that not only are individual recipients forced to take employment for which they are not suited, but also they are required to take demeaning employment at starvation wages which are unsuitable for everyone.

Plaintiffs are also concerned that regardless of what the State plan says on paper, Nevada fails to provide institutional day care, or to find non-institutional day care to allow mothers to work. The new Manual for public assistance in Nevada indicates that help is provided to mothers to develop a plan for day care to permit the mother to attain a condition of self-support. This is not only inadequate in so far as it fails to indicate that day care is either provided or found by the State, but is also not carried out in the administration of the plan.

Nevada ~~plans~~, according to Nevada newspapers, will accept only an insufficient number of slots for persons who desire to work under the Work Incentive Program. The Nevada State Journal, on Wednesday December 3, 1969 stated that Governor Laxalt

stated that only 50 slots for jobs will be provided. There are 7,500 recipients in the State and under Title V there are 500 slots. The State has agreed to provide $100,000 of funds as its contribution to the work incentive program over two years. NWRO seeks to call witnesses to determine whether these funds provide money for day care for children of mothers who work in the program or for extra medical care that such employment might require.

These examples demonstrate the need to allow plaintiffs fully to participate.

In conclusion, with the stakes so high in terms of life, human misery, and the welfare of children, defendants insist that they alone should be allowed to vindicate the interests of plaintiffs, and the welfare recipients they represent demand the right to vindicate their own interests themselves leaving to HEW the protection of the fiscal interests of the United States. Plaintiffs can best perform that task because of its crucial importance to them and their intimate knowledge of the facts involved. They seek a means to participate in a democratic system in an orderly way, and are confounded by, and do not understand the reason for the obsta cles HEW officials place in their way. In no way can the duty of the United States, through HEW, to enforce the law be hampered; instead, plaintiffs' participation can only promote that objective.

STATUTES INVOLVED

42 USCA 604(a): "If the Secretary, after reasonable notice and opportunity for hearing to the State

agency administering or supervising the administration of such plan (detailing the administration of AFDC payments within the State) finds...in the administration of the plan there is a failure to comply substantially with any provision required by Section 602(a) to be in the plan...the Secretary shall notify such State agency that further payments will not be made to the State...."

42 USCA 1316(4): "The findings of fact by the Secretary if supported by the substantial evidence, shall be conclusive."

5 USCA 551(3): "Party" -- "A person...entitled as of right to be admitted as a party."

5 USCA 554(c): "The Agency shall give all interested parties opportunity for...(a) hearing and decision on notice and in accordance with sections 556 and 557 of this title."

STATEMENT OF POINTS

I. PLAINTIFFS HAVE A CONSTITUTIONAL RIGHT TO PROTECT THEIR LEGAL INTERESTS WHICH MANDATES THAT THEY BE ALLOWED TO INTERVENE AS PARTIES TO THE NEVADA HEARING.

II. JUDICIAL REVIEW IS AN INEFFECTIVE AND UNDESIRABLE ALTERNATIVE TO INTERVENTION IN THE ORIGINAL HEARING PURSUANT TO 5 USCA 554(c).

III. PLAINTIFFS ARE ENTITLED TO PROTECT THEIR LEGAL INTERESTS BY FULL PARTICIPATION IN THE NEVADA HEARING WITH THE RIGHTS TO ADDUCE EVIDENCE AND TO COMPEL THE PRODUCTION OF DOCUMENTS AND THE ATTENDANCE OF WITNESSES.

IV. PLAINTIFFS HAVE A COMMON LAW RIGHT TO INTERVENE.

SUMMARY OF ARGUMENT

Parties to administrative hearings are defined in the Administrative Procedure Act Section 551(3) as "persons...entitled as of right to be admitted as parties." Plaintiffs have an interest in the issues to be decided at the hearing that is protected by due process, that is, it is a legal right. These

rights will be affected by the outcome of the hearing and due process, at least, means that they are entitled to be heard. The legislative history of the Administrative Procedure Act buttresses the notion that Plaintiffs were intended to be parties. Decisional law dealing with other agencies demonstrate that the Administrative Procedure Act should be interpreted liberally in favor of intervention.

Plaintiffs no doubt would be entitled to judicial review either because they have been "legally wronged" or because they are persons "aggrieved" and "adversely affected." In order to make this right effective, they should be allowed to intervene, both in order to protect their right as required by the Due Process Clause or as a rule of practice. It is detrimental to administrative agencies and a waste of judicial energies to require a multiplicity of hearings, that is, to allow the state to be heard before the agency and plaintiffs in a de novo hearing in court.

The Social Security Act does not give rise to any inference of an attempt to exclude interested parties and under the common law they should be allowed to intervene. This is true both in the light of history and out of a sense of fairness and justice.

I. IN THE FIFTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES MANDATES THAT PLAINTIFFS BE ALLOWED TO PROTECT THEIR LEGAL INTERESTS

This Court found in granting the injunction pending appeal that plaintiffs have a deep and substantial interest in the

issues which are the subject matter of the conformity hearing. Appendix B, pp. 2 and 3. As was expressed in the Statement of the case above, the interests of plaintiffs and those they represent are deep; but additionally they represent legal rights recognizable at law and equity which cannot be taken without due process. Flemming v. Nester, 363 U.S. 603 (1960) In that case which dealt with the the power of Congress to amend the Social Security Act in a manner depriving benefit to persons formerly covered, the court stated:

> "The interest of a covered employee under the Act is of sufficient substance to fall within the protection...afforded by the Due Process Clause."
>
> 366 U.S. at 611.

A welfare recipient is no less entitled to due process when his statutory right is threatened. Indeed the argument can convincingly be made that because of the importance of the right involved the protection should be greater. Rothstein v. Wyman, -F. Supp.-(1969).

In Smith v. King, 392 U.S. 309 (1968), persons eligible for assistance were entitled to protect their right to assistance from being denied by the State when they were denied assistance because Alabama had a "man in the house" contrary to the AFDC provisions. In Rosado v. Wyman, __ F. Supp. __(awaiting decision by Supreme Court) and Jefferson v. Hackney, __F. Supp. ___ (N.D. Tex. 1969) recipients in States which did not adjust welfare payments in accordance with the provisions of 42 USCA 602(a)(23) were entitled to sue because they had been denied by the States a legal right Congress enacted for them. In

Rothstein v. Wyman welfare recipients in two suburban counties were entitled to sue to repair the legal wrong done to them when their welfare payments were reduced by the State below the payments in New York City despite similar costs of living. Defendants contention that welfare recipients have no standing to protect these same rights before the HEW is at best paradoxical.

Plaintiffs, and those they represent, having substantive legal rights which cannot be taken without due process of law must under the most elementary notions of due process be afforded an opportunity to be heard when those rights will be affected by an adjudication. Yet ~~this is~~ what plaintiffs are threatened with here ~~is~~ is that their right to receive assistance and their rights under the Work Incentive Provisions and Child Day Care Provisions of the AFDC Program may be diluted or completely taken, without any opportunity on their behalf to be heard, to present evidence and to meet the evidence and arguments of others who are parties to the hearing.

Indeed when one compares the interests and rights of the various parties, it is evident that plaintiffs are the real party in interest. HEW has a statutory obligation to secure compliance with the Federal statute in making grant payments to the State. Sadly this is an obligation that they have not historically taken as seriously as they should. In King. v. Smith, supra, one of the exhibits presented by plaintiffs, welfare recipient, was a letter from HEW stating that Alabama was not in conformity with Federal law. Yet no efforts were made

to find non-conformity and to hold a hearing; instead the noncompliance was ignored. See also Gaddis v. Wyman, __F.Supp. __(S.D.N.Y. 1969) Despite the well-known facts that many States are presently not in compliance on many issues and have not been for considerable periods of time, the number of conformity hearings scheduled by HEW in the past ten years can be counted on one hand. Indeed, Nevada is by HEW's own standards not in conformity on 602(a)(23) and yet that issues is not included in the hearing.

Nevada's main interest is that of a fiduciary or trustee of funds to be passed on to plaintiff Duncan and her children and the other welfare recipients in the State. While State funds are involved to some degree, Nevada is hardly more than an administrative agency to carry out the law and distribute funds. It is ironic that in view of the depth and substantiality of plaintiffs interest in protecting basic rights Congress mandated for them that they should be given only the right to make submissions and present an oral argument when HEW and Nevada will have the full rights provided in the Administrative Procedure Act for parties.

II. DEFENDANTS MAY NOT EXCLUDE PLAINTIFFS FROM FULL AND EFFECTIVE PARTICIPATION IN THE NEVADA CONFORMITY HEARING SINCE PLAINTIFFS ARE "ENTITLED AS OF RIGHT TO BE ADMITTED AS PARTIES" WITHIN THE MEANING OF SECTION 551(3) OF THE ADMINISTRATIVE PROCEDURE ACT.

Section 554(c) of the Administrative Procedure Act requires that "The agency shall give all interested parties opportunity for...(a) hearing and decision on notice and in

accordance with sections 556 and 557 of this title" when "the parties" are unable to consent to a determination of the controversy. "Party" is defined in section 551(3) and includes "a person entitled as of right to be admitted as a party." Plaintiffs claim that because of their unquestioned substantial interest and since they and those they represent may be legally injured by the outcome of the hearing that they are "entitled as of right to be admitted as a party." We know of no cases specifically interpreting these provisions.

A. The Legislative History of the Administrative Procedure Act Requires Plaintiffs to Be Admitted as a Party

The enactment of the Administrative Procedure Act resulted from the experience of administrative agencies running roughshod over those whose interests they had authority. Dean Roscoe Pound when he headed the American Bar Association Committee in 1938 noted "ten tendencies" of administrative agencies including the tendency "to hear only one side." 63 ABAR 23. President Franklin Roosevelt on January 12, 1937 transmitted the report of this Committee on Administrative Management together with a special message in which he said:

> "I have examined this report carefully and thoughtfully and am convinced that it is a great document of permanent importance.... The practice of creating independent regulatory commissions, who perform administrative work in addition to judicial work, threatens to develop a 'fourth branch' of the Government for which there is no sanction in the Constitution."
>
> Report with Special Studies, 1937, pp. iii-v.

The plan submitted by the President included the separation of judicial from all other functions performed by the agencies including within the Executive Department. The Report found that "the evils resulting from" the combination of administrative and judicial functions within the Executive Branch of the Government "are insidous and far reaching." Id. p. 40. Mixed duties said the report "undermines judicial fairness; it weakens public confidence in that fairness." Id. The report proposed totally divorcing within each agency administrative from judicial functions which if it had been enacted into law would have destroyed the administrative agencies. Both the special advantages and the potential evil of the agencies stem from the same source -- this combination of legislative and judicial functions.

The movement for the improvement of the rules of judicial procedure within the agency led the President at the recommendation of the Attorney General to authorize the Attorney General to create a committee to investigate administrative procedure. Administrative Procedure in Government Agencies -- Report of the Committee of Administrative Procedure, Appointed by the Attorney General, at the Request of the President, S. Doc. 8, 77th Cong. 1st Sess. 1940. While this report was being prepared the Congress passed the Walter-Logan Bill (S. 915 and H.R. 6324) in 1939 which was vetoed by the President largely because he wanted to await the Attorney General Committee's Report. H. Doc. No. 936, 76th Cong., 3d Sess. See also H.R. Report 1930, 79th Cong. 2d Sess. 1966. The Walter-Logan Bill would have created a separate

and independent administrative court.

The final bill which became enacted into law (S. 7 and H.R. 1203, 79th Cong. 1st Sess.) was a compromise bill that attempted to bring a uniform procedure to the agencies, to provide a measure of control but not interfere unduly with their efficient and economic operation.

In sum, the legislative history indicates three things about the Administrative Procedure Act: (1) It was designed "to assure fairness in the beginning" during the administrative process "so that litigation may become unnecessary." H.R. Rpt. 1980, 75th Cong. 2d Sess. 1938. (2) It sought to provide uniform procedures among the various agencies. (3) It attempted to have them function in their judicial capacities to the extent that their mixed duties allow as a court would. It is in this context that the Administrative Procedure Act defines "party". Congress intended that "party" mean the same thing as what "party" means in a court of law.

In the Legislative History, 79th Cong. 2d Sess. Sen. Doc. 248, it is explained that:

> "The words 'person' and 'party' are defined in many statutes and regulations. The definition is self-explanatory."
>
> (emphasis added)
> Ar 23.

In the Reports of the Senate and House Judiciary Committees on the Bill which was enacted. (Sen. Rpt. No. 752, 79th Cong. 1st Sess. at p. 19, H.R. Rpt. 1980, 79th Cong. 2d Sess.), the definition of "party" was explained as follows:

> "The practice of agencies to admit persons in proceedings for limited purposes does not of

course authorize an agency to ignore or prejudice the rights of the true or full parties to a proceeding."

-- At page 19.

These reports make it clear in the context of the purposes of the Administrative Procedure Act that parties are not only those persons named in some statute to be parties; instead, they are the persons who in the context of a judicial proceeding would be entitled to be parties. The true parties in interest, that is, those who have substantial rights at stake, were intended to be parties. Plaintiffs, here, have that kind of right at stake.

B. COURT DECISIONS RECOGNIZE PLAINTIFFS RIGHT TO INTERVENE

While it is true that there are no cases directly interpreting section 551(3) of the Administrative Procedure Act, there are several cases that outline the principle of intervention in administrative hearings. Particularly in view of the legislative history and intent of the Administrative Procedure Act to provide a degree of uniformity among the various administrative agencies, these cases interpreting the right to intervene in other administrative agencies provide useful guidelines for judging plaintiffs right here.

In American Communications Association v. U.S., 298 F.2d 648 (2d Cir. 1962), Chief Judge Lumbard held that the organizational plaintiff, a trade union representing employees of Western Union had a right to intervene where A.T.&.T. threatened the survival of the employer. Judge Lumbard for a unanimous court held that the Association would be "aggrieved" and entitled to

judicial review. Accordingly, he held:

> "Here intervention is necessary to make the right to review effective. Although 47 USCA 405 permits new evidence to be taken at the discretion of the Commission on a rehearing at the petition of a non-party, this is not an effective substitute for the right to adduce evidence, to cross-examine witnesses and to present arguments at the initial hearing. Interested persons must be allowed the option of participation from the outset. We are unconvinced by the Commission's argument that it must restrict the participation of interested parties before it in order to keep its hearings within a reasonable scope."

In the case at bar, it will be shown below that here also there is a right to judicial review; and under the circumstances plaintifs believe the argument in favor of intervention is even more cogent since there is no right of non-parties to petition for rehearing, and because the nature of the interest is so much more substantial.

In American Communication Association, what the court has really done is to broaden the definition of "party" to meet the modern need of full participation. The interest which the Association represented was identical to the interest of the employer, Western Union. The court could have readily found that the FCC did not abuse its discretion by excluding them. It chose instead to allow full participation by those who had an interest in the outcome even though the interest was already adequately represented. In the case at bar, plaintiffs' interest is not adequately represented and the reasons for inclusion are greater in terms of what plaintiffs can add.

In Office of Communication of United Church of Christ v.

F.C.C., 359 F.2d 994, U.S. App. D.C. (1966), a case in which the United Church of Christ was held to have a right to intervene to oppose the relicensing of a radio station, this Court voted in favor of the concept that those with legitimate interest should be allowed to participate.

> "Since the concept of standing is a practical and functional one designed to insure that only those with a genuine and legitimate interest can participate in a proceeding, we can see no reason to exclude those with such an obvious and acute concern as the listening audience."
>
> 359 F.2d at 999.

This is a sound rule and reflected in the decisions of the Supreme Court without reference to any particular statutory provision authorizing intervention. See for example Barrows v. Jackson, 346 US 249, Flast v. Cohen, 392 US 83, Hardin v. Ky. Utilities, 390 US 1 (1966). In the case at bar, the concern of the welfare recipients in a hearing that may determine whether they will receive the funds necessary to subsist is surely no less acute than the Church's concern over whether WLBT was relicensed.

Judge Burger in discussing the Commission's claim that they represent the public interest and that consequently intervention was unnecessary said:

> "Nor does the fact that the Commission itself is directed by Congress to protect the public interest constitute adequate reason to preclude the listening public from assisting in that task....(The Commission's) duties and jurisdictions are vast, and it acknowledges that it cannot begin to monitor or oversee the performance of every one of thousands of licenses."
>
> Id. at 700.

The Court continued:

> "Unless the Commission is to be given staff and resources to perform the enormously complex and prohibitively expensive task of maintaining surveillance over every licensee, some mechanism must be developed so that the legitimate interests of listeners can be made a part of the record which the commission evaluates.
>
> Id. at 702.

HEW's jurisdiction is also vast and it often has difficulty in learning what the performance of the 50 States are in relation to their compliance with Federal law. While there are less States for it to oversee than radio stations for the FCC, the number and complexity of the issues and the difficulty in learning of the actual administration of the Social Security Act, makes the task of HEW in this regard much more difficult than that of the FCC.

The legitimacy of plaintiffs interest here is unquestioned. Defendants concede it. Nevertheless, they insist plaintiffs should not be a party to the hearing, but in no way do they explain why or give a single reason for excluding them.

In United Church, the Court stated:

> "The Commission should be accorded broad discretion in establishing and applying rules for such public participation, including rules for determining which community respresentatives are to be allowed to participate and how many are reasonably required to give the Commission the assistance it needs in vindicating the public interest."

In the case before this Court, we are less concerned with the interests of the public and more with the interests of a particular class of citizens represented here by an organization solely concerned with them and run by them, a

class of people regularly excluded from government participation, namely, poor people struggling to survive on the meager sums of public assistance. Defendants counsel conceded on the motion for an injunction pending appeal that plaintiffs were the appropriate respresentatives of that class.

Standing is a "rule of practice," Barrows v. Jackson, supra, and this is no less true before an administrative agency than before the courts, or before one agency as compared to another. The rules of standing discussed here are sensible principles that transcend individual agencies and their controlling statutes and make clear an overriding theme in favor of full participation. Plaintiffs have an interest which as this court noted in its decision granting an injunction pending appeal should "be afforded an appropriately effective mode of manifestation." Defendants have never indicated what it is that makes full participation an ineffective mode or undesirable. In any case, it is the one to which plaintiffs are entitled.

III. JUDICIAL REVIEW OF A DETERMINATION MADE BY THE SECRETARY OF HEW AFTER CONSIDERATION OF THE EVIDENCE ADDUCED AT A CONFORMITY HEARING REQUIRED BY STATE

A. Plaintiffs have a right to judicial review

The judicial review provisions of the Administrative Procedure Act states:

> "A person suffering legal wrong because of an agency action, or adversely affected or aggrieved

by agency action within the meaning of a relevant statute is entitled to judicial review thereof."

Section 702.

In Rosado v. Wyman, supra, Chief Judge Lumbard stated in his opinion that the court should decline to exercise jurisdiction in the case initiated by welfare recipients, pending a determination of the question of conformity by HEW. He continued that the "Department's determination, it should be noted, will be reviewable in the courts at the instance of either the state, under 42 USC 1316(a)(3) (Supp. 1969) or the plaintiffs (welfare recipients) under the Administrative Procedure Act." At

Plaintiffs have standing to seek judicial review both because they have been "legally wronged" and because they have been "adversely affected" and "aggrieved." Invasion of a legally protected right constitutes a "legal wrong." Gonzalez v. Freeman, 334 F. 2d 292, 118 US App. D.C. 180 (1964). That plaintiffs have such a legally protected right is evident from Fleming v. Nestor, supra, Smith v. King, supra, Rosado v. Wyman, supra, and Jefferson v. Hackney, supra. Even if plaintiffs did not have such a legally protected right, they could still secure review under the "adversely affected or aggrieved" provision.

Since Federal Communication Comm. v. Sanders Brothers Radio Station, 309 U.S. 470 (1940), where the Supreme Court held that Sanders could appeal an FCC order licensing a competing station despite the fact that Sanders' license was not at stake, the courts have held that direct economic loss coupled with the

representation of a substantial public interest furnished a basis for standing to appear and challenge rulings of Federal administrative agencies in the courts. (See also Scripps-Howard, Inc. v. Federal Communications Comm., 316 U.S. 4 (1942), Associated Industries of New York State v. Ickes, 134 F. 2nd 694 (2nd Cir. 1943), Reade v. Ewing, 205 F. 2d 630 (2nd Cir. 1953), and Bebchick v. Public Utilities Comm. 287 F. 2d 337 (D.C. Circ. 1961).

In determinations made by the Defendants as a result of the conformity hearing in question, plaintiffs and those they represent may suffer substantial economic losses, because Nevada may have its Federal funds cut-off requiring a reduction or elimination of assistance; or because welfare recipients will be unable to take employment having no place to leave their children; or because they will be deprived of their work incentive payments, job training, and the right to have certain portions of their income excluded from consideration in determining the amount of their AFDC grant or their eligibility for such grants.

Judicial review is not limited to merely when there is an economic interest at stake; judicial review exists whenever a statute is designed to protect an interest, or creates a right for some person or group and it is illegally denied so that the person is adversely affected. Thus in United Church of Christ, the Federal Communications Act created a right in the listening public to hear balanced broadcasting. In Scenic Hudson Valley Preservation Conference v. FPC, 354 F. 2d 608 (2d Cir. 1965, cert. denied, 334 U.S. 941 (1966), Congress in

requiring that aesthetic, conservational and recreational aspects of power development created rights sufficient to allow persons interested in protecting fish's rights to be entitled to seek review of the FPC's action. In Hardin v. Kentucky Utilities Co., 390 U.S. 1 (1966), where Congress provided that the TVA "shall make no contracts for the sale of delivery of power which could have the effect of making the Corporation or its distributors directly or indirectly a source of power outside the area," the Supreme Court held that "Since the respondent is thus in the class which (the statute) is designed to protect, it has standing under familiar judicial principles... and no explicit statutory provision is necessary to confer standing." At pp. 3 and 7. In Western Addition Community Organization (WACO) v. Weaver, 294 F. Supp. 433 (1968) relocatees had the right to seek review of the Secretary of HUD's determination which denied them rights under the Housing Acts requiring a feasible plan for relocation of displaced persons.

The fact that the State is given the right to review adverse decisions of the Defendants is too "slender and indeterminate evidence of legislative intent" to preclude the important right to review by the plaintiffs herein. Jaffe, Judicial Control of Administrative Action (1965), page 357. In Abbot Laboratories v. Gardner, 387 U.S. 136 (1967) the Supreme Court held that a statute must actually preclude judicial review to deny access to section 702 of the Administrative Procedure Act. See Jaffe, 75 Harv. L. Rev. 255 (1961) and Rusk v. Cort, 369 U.S. 367.

Where the interest to be protected is freedom from economic competition, plaintiff must show Congress explicitly or implicitly granted the right to review. Rural Electrical Administration v. Central Louisiana Electric Co., 354 F. 2d. 859 (5th Cir. 1966). However even this rule has been severely limited. See Hardin v. Kentucky Utility Co. supra.

Judicial hostility to attempts to deprive people with substantial interests, even where those interests are not the kinds of interests protected by the due process clause is shown in Oestereich v. Selective Service System, 393 U.S. 233 (1969). There the Supreme Court allowed a selective service registrant to bring an affirmative suit upon the claim that he had been denied an exemption from the draft to which he was entitled. The Court allowed review of the System's determination despite the fact that section 10(b)(3) of the Military Selective Service Act appeared explicitly to prohibit review.

B. The Right to Judicial Review Requires That Where There is a Determination to Be Made Based on a Record, There Must Be a Concomitant Right to Intervene

Chief Judge Lumbard in deciding the American Communications Association case, stated that the right to judicial review requires a concomitant right to intervene in the initial hearing to make it effective. See also footnote 8 in United Church of Christ.

The reason for this in a case in which the reviewing court makes its determination based on the record alone is clear.

Plaintiffs would have been denied the right to help build that record and due process if it means anything would require that they not be bound by it. Even where there would be a right to a de novo hearing on review, it is still a good rule of practice to require that intervention in the original hearing be allowed. It avoids an enormous waste of both agency and judicial time and effort that would result from holding a hearing before the agency, a de novo hearing before the court, and if the agency action was not based on the substnatial evidence contained in both records, a new agency action and a new round of review.

Professor Davis in his Administrative Law Treatise, (1958) states:

> Satisfying the minimum requirements of due process must not be confused with developing a good system. Even if a de novo judicial review is held to cure administrative deficiencies from the standpoint of due process, the resulting system is not necessarily sound or desirable. Administrative hearings are often to be preferred to judicial hearings on review. The theoretical right of review is often illusory, as it is when the amount involved is small, when the hardship or cost of appealing to a court is relatively great, when the court is strongly influenced by the agency's view, or when despite the theoretical scope of review the court limits its inquiry to reasonableness. Furthermore, de novo review is often unsound in that it requires courts to perform functions for which they are poorly qualified."
>
> 1 Davis 7.10 page 451.

Professor Rexford in Administration of National Economic Control (1952) states that "unless applied at the periphery, (judicial review) runs counter to the basic idea of delegation of responsibility to administrative agents." Page 346.

Aside from the undesirability of the de novo review from

the agency, judicial and potential litigants points of view, it is not at all clear that plaintiffs are entitled here to a de novo hearing. See the discussion in Jaffe, supra, 186 to 192, and 622-623.

C. Plaintiffs Right to Intervene in the Hearing Cannot be Limited to the Submission of Documents and the Presentation of Oral Arguments

In his discussion of the requirement of a trial type hearing, Professor Davis stated:

> "The true principle is that a party who has a sufficient legal interest or right at stake in a determination of governmental action should be entitled to an opportunity to know and to meet, with the weapons of rebuttal evidence, cross-examination, and argument, unfavorable evidence of adjudicative facts, except in the rare instance when some other interest, such as national security, justifies an overriding of the interest in fair hearing."
>
> 1 Davis 7.02 page 412.

In the case of Citizens for Allegan Co., Inc. v. F.P.C., 414 F. 2d 1125 (1969), the court stated:

> "However, the right of opportunity for hearing does not require a procedure that will be empty sound and show, signifying nothing. The precedents establish, for example, that no evidentiary hearing is required where there is no dispute on the facts and the agency proceeding involves only a question of law.
>
> "An analogy is sometimes drawn from the court rules which provide summary judgment procedure for the cases that involve only legal issues and no bona fide disputed questions of fact, where it is quite clear what the truth is and there is really no issue to try.
>
> "This analogy calls to mind, however, that even in court litigation there are limitations on use of summary procedure, limitations that may

> usefully delineate, and restrict, the appropriate use of abbreviated procedures by administrative agencies required to act after opportunity for hearing."
>
> At 128.

See also United Church of Christ, supra, at 733-734.

In light of the importance of the issues involved to plaintiff and the stake they have in the outcome of the hearing, they can be afforded no lesser right than full participation. Plaintiffs cannot understand why they have been excluded except perhaps because they are poor people who have no right to governmental participation in the eyes of governmental officials.

Plaintiffs wish to be heard in this proceeding to protect their basic rights. They are forced to run an obstacle course to obtain what to many would seem an elementary and simple end -- an opportunity to be heard and to have their views and interests considered.

Major turmoil and political isolation and disorientation are rapidly becoming the standard for conduct in this country. Responsible studies place a substantial cause for this on a breakdown of thedemocratic political system which have become unresponsive to many elements in this society, but particularly to poor people and black, brown and red people generally. See the Riot Commission Report, the Skolnik Report to the National Committee on the Causes and Prevention of Violence, The Politics of Protest, and the Cox Commission Report, Crisis at Columbia, for example. The Report of the National Advisory Commission on Civil Disorders in its discussion of disorders in the cities

states:

> "It is plain that the Negro ghetto resident feels deeply that he is not represented fairly and adequately under the arrangements which prevail....
>
> "To meet this problem, city government and the majority community should revitalize the political system to encourage fuller participation by all segments of the community..."
>
> Page 296, Bantam edition.

In the Interim Report 1968 of the Administrative Conference of the United States, a conference attended by representatives of most of the Federal agencies ~~[illegible]~~ in Recommendation No. 5 it was recommended that agencies should be encouraged to determine that the exceptions within the Administrative Procedures Act should not be applied where the poor have a substantial interest. While this was in the context of rule-making, it is no less equally applicable here. Congress has increasingly recognized the need for the poor to participate which has been demonstrated by the requirement in OEO legislation for "maximum feasible participation" by the poor.

However, the restrictive view of who should be allowed to be heard represented here by HEW is not altogether surprising when one considers that most governmental agencies have sought at one time or another to do what HEW seeks to do here. But the courts have time and again played a constructive role by maximizing avenues for legitimate and orderly participation. It was the courts which decided Sanders Bros. Radio Stn. 309 U.S. 470 (1940), NBC v. FCC (KOA) 132 F. 2d 545 (1942) aff'd 319 U.S. 239 (1943) United Church of Christ, supra, Scenic Hudson.

v. Norwalk Redevelopment Corp, 395 F. 2d 920 (2d Cir. 1968).
supra, Norwalk Core, supra, WACO, supra, and in a different context Barrows v. Jackson, 346 U.S. 249 and Hardin v. Ky. Util., supra, different context to mention only a few.

It should above all be recognized that plaintiffs here do not seek to usurp executive decision-making. What plaintiffs seek is a simple right -- the right to be heard and to participate in a hearing that affects vital interests of theirs and those they represent -- interests that include their right to eat and live, and their right to hold meaningful and gainful employment.

IV. Plaintiffs Have a Common Law Right to Intervene

The history of the Social Security Act is bare of any indication that Congress intended to bar welfare recipients from hearings held pursuant to Section 604(a) of 42 USCA. Unless there is a specific Congressional exclusion of interested parties from the hearings, they should not be barred from them. Such a rule is necessary to give full effect to the statutory and common law rule on judicial review: unless it is explicitly barred it should be granted. While there are no express indications of an intention to include recipients in such hearings, one might fairly imply such an intention from the entire purpose of the Act. The Act is expressly designed to benefit the people who need and are eligible for assistance. Almost all of the original conditions which a State had to meet to secure Federal funding were included for the benefit of recipients of aid; most of the conditions added by amendment have the same purpose.

The Secretary is and his predecessors were administrators of a program to benefit the plaintiffs. The States are, likewise, administrators of a program to benefit the plaintiffs. Surely, it may be inferred that Congress did not intend to bar the beneficiaries of the program - the parties with the only real interest in the program - from a hearing at which the two administrators decided whether the beneficiaries were obtaining their legal benefits. One can hardly believe that Congress meant to bar the master from the servants' deliberations.

Even if one were to assume that the Congress in 1935 had no particular intention with regard to recipient participation at hearings pursuant to Section 604(a), this Court must decide whether in 1970 recipients have a right to such participation.

When the Social Security Act was first passed there were no organizations of welfare recipients. Neither poor people nor their elected representatives testified before the Congressional Committees which built the welfare programs. Now recipients do speak for themselves. They have founded and built an organization to represent them and speak for their interest. The elected leaders of that organization appear before Congressional committees, meet with the Secretary of Health, Education and Welfare, lobby before State legislatures, etc. If Congress did not know of organized recipients in 1935, this Court knows of them and has them before it in 1970.

In 1935 it was unheard of for labor unions to speak for their members in administrative agencies. As late as 1940,

Justice Black added by way of dictum in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), that it was ludicrous to believe that an individual steel worker had standing to sue to enforce minimum wage provisions. But individual workers no longer challenge illegal and unfair administrative actions on their own. The organizations they have built challenge such action for all workers. The history of the labor movement - of the coming together of individuals to fight their common battles together - was not before the Congress in 1935; it is before this Court in 1970.

Recently, the Secretary of HEW met with organized recipients for the first time. He recognized their organization, and his staff in a series of meetings with them has repeatedly acknowledged that organized welfare recipients have an expertise about welfare programs, problems and administration which no one else has. Such a recognition was unthinkable in 1935; in 1970 only the most ill-informed dispute it. Congress itself has taken steps since the enactment of the Act to assure that interested parties are assured full participation in Federal agency proceedings. The spirit of the Administrative Procedure Act, whatever its actual letter may be held to provide, is for fuller and fairer access to agency proceedings.

In 1935 the country sought a solution to the Depression based on the dole and make-work. In recent years various high level commissions have recognized that money is not the only problem separating the rich from the poor. The poor in America have no control over their lives, no hand in shaping decisions

which primarily affect them. The despair which leads to civil disorder comes as much from the sense of being disengaged from the society as from being poor.

The courts have taken the lead in granting such involvement. Without becoming involved in analyses of the Administrative Procedure Act, courts have granted displaced tenants the right to challenge the relocation plans of the government, have granted T.V. viewers the right to challenge the assignment of licenses, have given black people the right to challenge government timetables on integration.

Although many of the cases involving regulatory agencies are not precisely analogous to that before the Court, the trend toward permitting the greatest possible participation in administrative action is dear. The policy behind this whole line of cases is that, whether on grounds of due process, the Administrative Procedure Act, or specific enabling statutes, fairness and a concern for social cohesion demand the fullest participation for the truly interested parties in administrative proceedings.

The issue before the Court is the most pressing one of our time. It was not before the Congress in 1935 and a 35 year old silence should not be made to answer a new and difficult problem. The issue in this case is whether two governmental agencies charged by law with preserving certain rights for the plaintiffs can exclude them from a hearing at which the two agencies will decide whether they have been meeting their legal duty to the plaintiffs. This case poses the most obvious example of people being denied access to proceedings in which every aspect of their

lives are the major issue. Congress did not explicitly bar them from such proceedings and if it was silent on their participation the Court must view that silence with 35 years worth of hindsight and learning.

CONCLUSION

For the foregoing reasons it is respectfully requested that an order denying a preliminary injunction be reversed.

Respectfully submitted,

Carl Rachlin
M. James Spitzer, Jr.
General Counsel
National Welfare Rights Organization
140 W. 62nd Street
New York, New York

Florence Roisman
416 Fifth Street, N.W.
Washington, D.C.

Roger L. Rice
National Welfare Rights Organization
1419 H Street, N.W.
Washington, D.C.

Edward V. Sparer
University of Pennsylvania Law School
Philadelphia, Pennsylvania

Certificate of Service

I, M. James Spitzer, Jr., an attorney for the National Welfare Rights Organization, do hereby certify that on January 19, 1970 I did serve by depositing, postage prepaid, in a United States mailbox, a copy of the attached Brief for Appellants addressed to:

Raymond Battocchi
United States Department of Justice
Washington, D.C. 20530

James Spitzer, Jr.

Justice Black added by way of dictum in Perkins v. Lukens Steel Co., 310 U.S. 113 (1940), that it was ludicrous to believe that an individual steel worker had standing to sue to enforce minimum wage provisions. But individual workers no longer challenge illegal and unfair administrative actions on their own. The organizations they have built challenge such action for all workers. The history of the labor movement - of the coming together of individuals to fight their common battles together - was not before the Congress in 1935; it is before this Court in 1970.

Recently, the Secretary of HEW met with organized recipients for the first time. He recognized their organization, and his staff in a series of meetings with them has repeatedly acknowledged that organized welfare recipients have an expertise about welfare programs, problems and administration which no one else has. Such a recognition was unthinkable in 1935; in 1970 only the most ill-informed dispute it. Congress itself has taken steps since the enactment of the Act to assure that interested parties are assured full participation in Federal agency proceedings. The spirit of the Administrative Procedure Act, whatever its actual letter may be held to provide, is for fuller and fairer access to agency proceedings.

In 1935 the country sought a solution to the Depression based on the dole and make-work. In recent years various high level commissions have recognized that money is not the only problem separating the rich from the poor. The poor in America have no control over their lives, no hand in shaping decisions

which primarily affect them. The despair which leads to civil disorder comes as much from the sense of being disengaged from the society as from being poor.

The courts have taken the lead in granting such involvement. Without becoming involved in analyses of the Administrative Procedure Act, courts have granted displaced tenants the right to challenge the relocation plans of the government, have granted T.V. viewers the right to challenge the assignment of licenses, have given black people the right to challenge government timetables on integration.

Although many of the cases involving regulatory agencies are not precisely analogous to that before the Court, the trend toward permitting the greatest possible participation in administrative action is dear. The policy behind this whole line of cases is that, whether on grounds of due process, the Administrative Procedure Act, or specific enabling statutes, fairness and a concern for social cohesion demand the fullest participation for the truly interested parties in administrative proceedings.

The issue before the Court is the most pressing one of our time. It was not before the Congress in 1935 and a 35 year old silence should not be made to answer a new and difficult problem. The issue in this case is whether two governmental agencies charged by law with preserving certain rights for the plaintiffs can exclude them from a hearing at which the two agencies will decide whether they have been meeting their legal duty to the plaintiffs. This case poses the most obvious example of people being denied access to proceedings in which every aspect of their

lives are the major issue. Congress did not explicitly bar them from such proceedings and if it was silent on their participation the Court must view that silence with 35 years worth of hindsight and learning.

CONCLUSION

For the foregoing reasons it is respectfully requested that an order denying a preliminary injunction be reversed.

Respectfully submitted,

Carl Rachlin
M. James Spitzer, Jr.
General Counsel
National Welfare Rights Organization
140 W. 62nd Street
New York, New York

Florence Roisman
416 Fifth Street, N.W.
Washington, D.C.

Roger L. Rice
National Welfare Rights Organization
1419 H Street, N.W.
Washington, D.C.

Edward V. Sparer
University of Pennsylvania Law School
Philadelphia, Pennsylvania

Nos. 23,787 and 23,890

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NATIONAL WELFARE RIGHTS
ORGANIZATION, et al.,

Appellants

v.

THE HONORABLE ROBERT FINCH, Secretary,
United States Department of Health,
Education and Welfare, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ALAN S. ROSENTHAL,
RAYMOND D. BATTOCCHI,
Attorneys,
Department of Justice
Washington, D.C. 20530

INDEX

CITATIONS

Cases:

---

* Cases and authorities chiefly relied on are marked by asterisks.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,787 and 23,890

THE NATIONAL WELFARE RIGHTS ORGANIZATION, et al.,

Appellants

v.

THE HONORABLE ROBERT FINCH, Secretary, United States Department of Health, Education and Welfare, et al.,

Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE APPELLEES

ISSUES PRESENTED

Under the Social Security Act, the Secretary of Health, Education and Welfare administers, in conjunction with the States, various public assistance programs; and he provides grants-in-aid to States which submit to him State plans which comport with specified requirements of the federal statute. Plaintiffs are individual recipients of public assistance and private organizations of such recipients. The questions presented

are:

1) Whether plaintiffs have a right to be included in negotiations between the Secretary and a State looking to the submission of an acceptable plan by the State, and;

2) Whether, in a hearing called by the Secretary to determine whether a State's plan conforms with the requirements of the federal statute, plaintiffs have the right to participate as parties on a basis equal to that of the Secretary and the State.

* * * *

Pursuant to Rule 8(d) of this Court, we indicate that these cases have previously been before this Court on applications for interlocutory relief. Orders were entered in No. 23,737 on January 2, 1970 and January 20, 1970. An order was entered in No. 23,890 on January 21, 1970.

STATEMENT

These consolidated appeals are from orders of the district court denying applications for preliminary injunctive relief in an action brought by the appellants, certain organizations of welfare recipients and individual recipients of welfare benefits, seeking to compel the Secretary of Health, Education and Welfare to permit them to intervene in pending formal and informal administrative proceedings. Those proceedings are concerned with the matter of the compliance by the States of Nevada and Connecticut with the requirements imposed by the Social Security Act with

respect to the administration by the states of their federally aided public assistance programs. The background of the litigation may be summarized as follows:

1. The AFDC Program. Pursuant to the Social Security Act (the "Act"), the Federal Government provides grants-in-aid to States which administer programs for supplying assistance to specified categories of needy individuals and families. One of these programs, which is involved in both the Nevada and Connecticut proceedings, is the Aid to Families With Dependent Children ("AFDC") Program, 42 U.S.C. 601, et seq., which provides welfare assistance to children who are deprived of parental support. 1/

AFDC is financed by the Federal Government on a matching fund basis. 2/ States are not required by the Act to participate in But all do AFDC. See 42 U.S.C. 601. However, States which choose to participate 3/ are responsible for administering the program. The establishment of criteria for need and other factors of eligibility are left largely to the States. At the same time, the Act prescribes specified requirements with which all AFDC programs must comply. In this connection, the States are required to submit to the Secretary, and have approved by him, a plan which describes the program adopted by the State.

1/ Other grant-in-aid programs, which involve only the Connecticut proceedings, are: Old Age Assistance ("OAA"), 42 U.S.C. 301 et seq., Aid to the Blind ("AB"), 42 U.S.C. 1201, et seq., Aid to the Permanently and Totally Disabled ("APTD"), 42 U.S.C. 1351 et seq., and Medical Assistance ("MA"), 42 U.S.C. 1396 et seq.

2/ As the Supreme Court noted in King v. Smith, 392 U.S. 309, 316 (1968) the federal government assumes the major portion of the program's cost.

3/ In June of 1968 each of the fifty states participated. See King v. Smith, 392 U.S. 309, 311 (1968).

Section 402 of the Act, 42 U.S.C. 602 (Supp. IV), imposes the requirements with which the State plan must comply. Section 403, 42 U.S.C. 603, provides that the Secretary of the Treasury "shall * * * pay to each State which has an approved plan" an amount calculated according to specified formulas. And Section 404(a), 42 U.S.C. 604(a) (Supp. IV), gives the Secretary the power to terminate federal payments to States whose plans do not conform to the requirements of Section 402.

2. Administration of AFDC -- Negotiations and Conformity Hearings. The Secretary of the Department of Health, Education, and Welfare (the "Department" or "HEW") has delegated responsibility for the administration of AFDC to Miss Mary E. Switzer, Administrator, Social and Rehabilitation Service, Department of HEW ("SRS"). Miss Switzer has been for many years an administrator of federal grant-in-aid programs involving federal payments to States which submit State plans which must conform to statutory requirements. As the Administrator of AFDC, she is familiar with the functioning of the program, and records and documents in the Department concerning the administration of the Act. She explained that the AFDC program functions in the following manner 4/ (J.A. 33-35).5/

4/ The statements in the three paragraphs which follow are based on an uncontradicted, signed affidavit of the Administrator filed in the district court, which must, for purposes of this appeal, be taken as true. We note that since this appeal is from the denial of injunctive relief, the Secretary and the Administrator were not given an appropriate opportunity to supplement this affidavit with other, more particularized documentary and testimonial evidence.

5/ References are to pages in the Joint Appendix.

In the ongoing administration of AFDC, negotiations between State and Federal officials are a common, everyday occurrence. Negotiations relate to whether existing State plans, as written and as administered, comport with the requirements of section 402 of the Act and implementing federal regulations. When new requirements are added to section 402 by Congressional Amendment, officials of the Department are responsible for negotiating with State officials concerning whether changes in the State's plan conform with the new Amendments. During the fiscal year ending June 30, 1967, the last period for which complete records are available, Federal officials dealt with and disposed of 4685 items of plan material submitted by the States.

The negotiation process involves constant communication, by correspondence and telephone, between the Regional Offices of SRS, which are responsible for administering AFDC locally, and the Central Office of SRS in Washington, D. C., which effectuates policies of nationwide applicability. Discussions between SRS officials and officials of other Federal agencies--for example, the Department of Labor, which administers the related Work Incentive ("WIN") Program (see infra, pp. 7, 9)--may be necessary. In addition, both Regional and Central Office SRS officials communicate frequently with State officials through telephone conversations, correspondence, and conferences. This process is designed to apply federal policy to the thousands of items of plan material which must be considered each year, and to obtain from the States approvable plan material.

It has been the experience of the Administrator that negotiations between Federal and State officials concerning conformity of the State's plan generally result in compliance by the State. And in the great majority of cases it is unnecessary for the Administrator to call a conformity hearing, the nature of which will be described more particularly below. But even in those cases in which conformity hearings are called, negotiations between State and Federal officials continue. In a case involving a 1960 conformity hearing, negotiations carried on during and after the hearing resulted in the submission by the State of approvable plan material. (J.A. 33).

If the Secretary is unable to obtain conformity from a State through negotiation, he may enforce the provisions of section 402 by terminating Federal payments to that State. See 42 U.S.C. 604(a) (Supp. IV). Before the Secretary may exercise this power, however, he is required by the Act to make a finding of non-conformity "after reasonable notice and opportunity for hearing to the State agency" administering the State plan. 42 U.S.C. 604(a). Section 1116(a)(3) of the Act, 42 U.S.C. 1316(a)(3) (Supp. IV), pertinently provides that "[a]ny State which is dissatisfied with * * * a final determination of the Secretary under section [4, 404, 1004, 1404, 1604, or 1904] may * * * file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination."

The Secretary has implemented this hearing requirement in a regulation, [6] 45 C.F.R. 201.5, which pertinently provides

> (a) When withheld. Certification of grants to a State is withheld if the Commissioner, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of an approved plan, finds:
>
> > (1) That the plan has been so changed that it no longer complies with the provisions of section 2, 402, 1002, 1402, or 1602 of the Act; or
> >
> > (2) That in the administration of the plan there is a failure to comply substantially with any such provision.
>
> * * *
>
> (c) Informal discussions. Hearings with respect to matters under paragraph (a) * * * of this section are generally not called, however, until after reasonable effort has been made by regional and central office representatives to resolve the questions involved by conference and discussion with State officials. Formal notification of the date and place of hearing does not foreclose further negotiations with State officials.
>
> (d) Conduct of hearings. Applicable requirements of the Administrative Procedure Act are observed in conducting the hearings referred to in [paragraph (a)] * * * of this section.

3. The Proposed Nevada Hearing. On June 1, 1955, the State of Nevada began administering an AFDC plan which was approved by the Secretary under 42 U.S.C. 602(b). In the 1967 Amendments to

---

6/ The Secretary is empowered by Section 1102 of the Act, 42 U.S.C. 1302, to "publish such rules and regulations, not inconsistent with [the Act], as may be necessary to the efficient administration of the functions with which [he] is charged under [the Act].

the Act, 7/ Congress added, among others, these new requirements with which State plans must comply: 1) Section 402(a)(19), as implemented by 45 C.F.R. 220.35, which requires the State to provide for referral of certain individuals to the WIN Programs established by the Secretary of Labor, and to contribute 20 per cent of the cost of such Programs; 2) Section 402(a)(8)(A)(ii), as implemented by 45 C.F.R. 233.20(a)(11)(ii)(b), which provides that the States shall, when determining the needs of eligible members of a family, disregard specified amounts of earned income of certain members; and 3) Sections 402(a)(14) and (15), as implemented by 45 C.F.R. 220.18(a), which requires the States to provide for programs of services to families with dependent children, including child care services for parents who are required by the State to achieve training and employment.

Nevada failed to submit amendments to its plan which would meet the requirements established by these 1967 Amendments. The Secretary conducted extended negotiations with the State in an attempt to secure from it a commitment in its State plan to comply with the new Amendments, but those negotiations proved unsuccessful. (J.A. 36). Subsequently, on November 14, 1969, the Administrator notified Nevada officials by letter that, in her judgment, "there are serious questions as to whether the Nevada State Plan meets requirements of the Federal law and regulations * * *." "Accordingly," the letter continued

> "I hereby notify * * * Nevada * * * that it will have an opportunity for a hearing in accordance with section 404(a) of such Act and 45 CFR 205.1

7/ These Amendments, adopted by Congress on December 15, 1967, were approved by the President on January 2, 1968, and became Public Law 90-248, 80 Stat. 821.

> on the question of whether further Federal grants may be made to the State under Title IV, part A of such Act for the operation of its State Plan * * *." [J.A. 36].

The Administrator further notified Nevada of her expectation that three issues would be involved in the hearing: whether the State plan complied with the 1967 Amendments 1) with respect to a WIN program, 2) for disregarding specified amounts of income of members of a family, and 3) for providing certain parents with child care services. The hearing was scheduled for December 1, 1969, in Washington, D. C. (J.A. 36). This date subsequently was changed to January 6, 1970. 8/

On November 23, 1969, HEW announced in a press release that the Nevada conformity hearing would be held in December, 1969. (J.A. 30-31). By letter dated December 1, 1969, the National Welfare Rights Organization (the "NWRO") requested of the Administrator that it be granted "status as a party" in the Nevada conformity hearing. (J.A. 40). Such status, the NWRO stated, would include:

1) The right to present evidence on all matters raised at these hearings

2) The right to cross-examine witnesses whether presented by the Department, Nevada or any other party

3) The right to propose findings on which the Administrator shall rule in the decision following the hearing

---

8/ The Administrator re-scheduled the hearing for January 6, 1970, in a letter to the Governor of Nevada dated December 2, 1969, which replied to his letter dated November 28, 1969. (J.A. 39).

4) The right to call witnesses, including employees of the Department, Nevada, and any other party

5) The right to full discovery of pertinent documents and information in the possession of either HEW or Nevada

6) The right to timely notice of all future proceedings in this matter

7) The right to participate in any pre-hearing conferences and

8) Any further rights as shall be necessary to enable NWRO to fully and adequately represent the interest of welfare recipients in this hearing. [J.A. 40].

The NWRO indicated, in addition, that it desired to raise in the hearing issues which went beyond those specified by the Administrator:

> * * * NWRO * * * contends that the [WIN Program is] * * * preemptive of all state imposed work requirements. HEW will permit Nevada to conduct a WIN program which does not cover all counties; neither HEW nor Nevada is likely to testify to or present evidence on the extent to which work rules more restrictive than those in WIN are or will be in force in non-WIN counties. [J.A. 41-42].

The NWRO also indicated the desire to explore the alleged failure

> to abide by sections of the Act or implementing regulations which recipients feel are detrimental to their interests, and which they might challenge as unconstitutional, as based on improper constructions of the Act, as inconsistent with precedents established in earlier departmental hearings, etc. [J.A. 40].

By letter dated December 4, 1969, to the General Counsel of the NWRO, the Acting Administrator stated that the conformity hearing had been postponed until January 6, 1970 and that if, before that time, Nevada revised its plan in a manner acceptable to HEW, no hearing would be necessary. (J.A. 43). In view of this postponement, HEW deemed it unnecessary to rule on the NWRO's request to intervene in the hearing as a party. (J.A. 31).

However, the Administrator stated her position in an affidavit dated December 16, 1969, as follows:

> * * * under the law and regulations, 42 U.S.C. 604(a) and 45 CFR 201.5, only the State of Nevada * * * has a right * * * to participate as a party in the proceedings initiated pursuant to such provisions. Our consistent practice has been to deny the request of anyone other than the State involved to participate as a party and, in the exercise of discretion, to permit interested persons, in the capacity of amici curiae, to submit written statements containing information and views relating to the issues, to attend the hearing, and to be afforded opportunity to make oral statements of their views at the hearing. [J.A. 31-32].

In a telegram of December 4, 1969, to the Administrator, the NWRO stated that it had heard that Nevada had agreed to bring its plan into conformity on the three issues defined in the Administrator's letter of November 14, 1969. The telegram continued that, if this was true, "we urgently request that no order of any kind or any settlement agreement be made unless NWRO and the persons up (sic) represents be permitted to be heard" along with the HEW and Nevada officials responsible for negotiating the settlement. (J.A. 51). By letter dated December 9, 1969, the Administrator replied that, while she was aware of the NWRO's interest in the proceedings, "negotiations concerning State compliance with Federal requirements are to be settled between the State and the Department of Health, Education, and Welfare, and * * * the inclusion of third parties is inappropriate." (J.A. 52). The Administrator indicated, however, that she would consider any information or arguments that the NWRO might submit in connection with the negotiations. Id. The date set for the proposed hearing,

January 6, 1970, remained unchanged.

4. The Connecticut Hearing. As the events leading up to the scheduling of the Nevada hearing were unfolding, there began to unfold a parallel series of events which led to the convening of a conformity hearing between officials of HEW and the State of Connecticut.

By letter dated November 14, 1969, the Administrator informed the State of Connecticut that it would be called to a conformity hearing to be held in Washington, D. C., in January, 1970. 9/ This information was made public in the same press release of November 23, 1969, that announced the Nevada hearing. (J.A. 128). In the November 14, 1969 letter, the Administrator indicated that the State would be given

> * * * an opportunity for a hearing, as provided for in sections 4, 404(a), 1004, 1404, and 1904 of the Act and the Federal regulations in 45 CFR 201.5, on the question of the eligibility of the State to continue to receive Federal grants under Title I, IV (Part A), X, XIV, or XIX for the operation of its State plans under the respective Titles. [J.A. 92].

In the November 14, 1969, letter, and a letter dated December 19, 1969, the Administrator indicated here anticipation that

---

9/ In this letter the hearing was scheduled for January 6, 1970. Subsequently, this date was changed to January 20, 1970. (J.A. 128).

numerous specified issues would be raised at the hearing. These issues, which involve AFDC and numerous other federally assisted programs, may be summarized as follows:

> 1. Whether the State was properly implementing federal disregard of income regulations in its AFDC, OAA, MA and AB programs; 10/
>
> 2. Whether the State's failure to provide any plan material in connection with specified portions of each program named in the November 14, 1969 letter rendered those programs out of compliance with the Act;
>
> 3. Whether the State properly deemed certain children ineligible for assistance under AFDC; and
>
> 4. Whether, under all the named programs, the State was properly restricting the use of information concerning recipients. [J.A. 92-96].

The Administrator informed the State that she would attempt to cooperate with it if it chose "to have a pre-hearing conference to define the issues further, to explore the possibility of stipulations, or for any other" worthy purpose. The Administrator also indicated her willingness to arrange a conference in her office to discuss informally any of the issues raised. (J.A. 95)

On January 2, 1970, as is discussed in greater detail below, this Court entered an order enjoining pendente lite the Nevada hearing unless plaintiffs were given the same rights as those accorded the Department and the State. See infra, p. 14.

10/ These regulations provide, in essence, that when the State calculates the amount of benefits to which a needy recipient is entitled, the State must follow certain principles and methods relating to the kind and amount of income that may or may not be deducted in calculating the benefits. (J.A. 92-94).

By letter dated January 12, 1970, the NWRO requested of the Administrator "that you grant us the same status with the same rights as Connecticut and HEW in the Conformity Hearing against Connecticut presently scheduled for January 20, 1970." (J.A. 97). By letter dated January 14, 1970, the Administrator replied that the requests to intervene in the hearing and negotiations would be denied; that the NWRO could participate in the hearing as an amicus; that much effort had gone into preparing for the hearing, which was less than a week away; that a hearing examiner had been appointed and State and Federal officials were prepared to proceed; and that, in light of this, the hearing would proceed as scheduled on January 20, 1970. (J.A. 98)

5. Judicial Proceedings. This action was instituted in the district court on December 7, 1969 by the NWRO; the Las Vegas Welfare Rights Organization (the "LWRO"); the Reno Welfare Rights Organization; and Mrs. Rubie Duncan, in her capacity both as an official of the NWRO and the LWRO and as an individual, on her own behalf and on behalf of her needy children, and on behalf of all similarly situated AFDC recipients and their needy children. The complaint was addressed solely to the Nevada proceedings. Plaintiffs sought to enjoin HEW from 1) conducting the conformity hearing unless plaintiffs were permitted to intervene to exercise all the rights asserted in plaintiffs' letter of December 1, 1969, to the Administrator; and 2) settling with State officials any of the issues to be raised at the hearing. (J.A. 14-16). The district court, after a hearing, denied preliminary injunctive relief on the ground that plaintiffs had shown neither a likelihood

of success on the merits nor irreparable injury. (J.A. 62).

Plaintiffs then filed a motion for an injunction pending appeal in this Court, in which they sought to prevent the defendants from 1) holding a hearing on January 6, 1970, and 2) continuing negotiations or discussions with Nevada to resolve their differences unless plaintiffs were made a party to the negotiations. (J.A. 64-66). On January 2, 1970, this Court (in Appeal No. 23,787) ordered "that appellees shall not hold the proposed hearing without according to appellants whatever procedural rights are exercised by the other parties thereto." The Court added, however, "that if appellees elect not to proceed with the hearing on this basis, appellees are under no restriction with respect to continuing efforts on their part to bring Nevada voluntarily into a state of full compliance, consistent with the statutory interests of these appellants." (J.A. 83).

Notwithstanding this Court's January 2, 1970 order, the NWRO did not take any immediate steps to attempt to have the proposed Connecticut hearing brought under its terms. And, on Tuesday, January 20, 1970, the Connecticut conformity hearing began as scheduled. Present were officials of HEW, and a number of Connecticut officials, including the Attorney General and two Assistant Attorneys General of that State. (J.A. 118). Also present were Mrs. Beulah Sanders, Vice President of the NWRO, numerous welfare mothers from the State of Connecticut, and their attorneys. (J.A. 119).

After the hearing began, Mrs. Sanders requested of the hearing examiner that she and the welfare mothers be granted "full

participation" in the hearing. This included the request that each individual welfare mother, as well as their attorneys, be permitted to cross-examine witnesses. (J.A. 119-120). The hearing examiner ruled that only HEW and Connecticut were parties in the hearing, and that neither the welfare mothers nor their attorneys would be permitted to cross-examine witnesses. (J.A. 122). Shortly thereafter, the welfare mothers disrupted the hearing, and it was adjourned. (J.A. 123-126).

On the same morning as the administrative hearing began, attorneys for the NWRO filed a motion in the district court to amend their complaint in the Nevada case by 1) adding parties, including named individuals and two organizations, the Waterbury Welfare Rights Organization and the New Haven Moms; and 2) making the complaint applicable to the Connecticut hearing. At the same time, the NWRO filed in this Court an emergency motion for further injunctive relief pending appeal. The motion sought to have this Court issue with respect to the Connecticut hearing an order similar to the Court's order of January 2, 1970 (J.A. 99-100). After considering the motion and hearing argument, the Court, noting "that no request for the injunctive relief sought here has been presented to the District Court," denied the motion "without prejudice to counsel for appellants seeking appropriate relief in the District Court * * *." 11/

11/ This order was numbered 23,787 (J.A. 104).

Later that same day, January 20, the NWRO filed an application for "injunctive relief" in the district court. The NWRO made an oral statement to the court, but neither called witnesses nor introduced documentary evidence. The defendants introduced two exhibits, but called no witnesses. The court made no findings of fact or conclusions of law. It did, ~~however,~~ make a statement noting 1) that there was no indication that the denial of injunctive relief would irreparably harm the plaintiffs, and 2) that if the Connecticut hearing proceeded, and if subsequently this Court decided the Nevada appeal adversely to defendants, the defendants would "be required to re-open the matter involving the State of Connecticut * * *". (J.A. 108). The district court then denied the request for relief, stating that "defendants are now in a position to have the matter squarely resolved by the Court of Appeals" (J.A. 109), and entered an order "that plaintiffs' application for temporary restraining order be * * * denied" (J.A. 105).

From the denial of that order adverse to them, plaintiffs filed an appeal in this Court (No. 23,890). After hearing argument, the Court, on January 21, 1970, ordered that its order of January 2, 1970, in appeal No. 23,787

> be and hereby is extended to the Connecticut hearing except that the restrictions of said order shall not be operative in (1) the giving of testimony by witnesses for the State of Connecticut now present in Washington, D.C. and (2) their cross-examination by representatives of the Department of Health, Education and Welfare. [J.A. 111].

At 10:00 a.m. on January 21, 1970, the Connecticut hearing was reconvened. After brief interruptions by one Miss Williams, the hearing examiner was permitted to state that the hearing would be recessed until 2:00 p.m. (J.A. 132). At 2:00 p.m. the hearing was resumed and the Federal government began to present its case.[12] (J.A. 134). HEW then offered in evidence signed stipulations agreed to by officials of HEW and Connecticut. Shortly after HEW resumed the presentation of its case, the hearing examiner was presented with a copy of this Court's order in No. 23,890, which he understood to mean "that we are enjoined from continuance of the Government's going forward with its case * * *."[13] Thereupon, the Attorney General of Connecticut, noting that Connecticut was "in the position of respondent" in the proceeding, stated that "[w]e will be prejudiced if we proceed today further under the rule which has been set down in the order * * *". (J.A. 138-139). The hearing was then recessed until further notice. (J.A. 139-140).

On January 29, 1970, the Secretary filed a motion to consolidate the appeals in Nos. 23,787 and 23,890, which was granted.

STATUTES INVOLVED

The statutes involved are set out in the Statutory Appendix, infra, pp. 1b-14b.

12/ The Administrative Procedure Act, 5 U.S.C. 556(d) (Supp. IV), pertinently provides that "[e]xcept as otherwise provided by statute, the proponent of a rule or order has the burden of proof."

13/ HEW has since informed us that it intended to present its case without calling any witnesses.

ARGUMENT

Introduction and Summary

1. It is important to note at the outset that this case does not involve the questions whether, and in what circumstances, the Secretary must call a conformity hearing or whether, and in what circumstances, the Secretary must terminate federal grants-in-aid to particular States. The dispute in the present case is set in the context of conformity hearings which already have been called. And, there is now pending in the district court a separate and independent action by the NWRO which seeks, inter alia, to require the Secretary to terminate payments to a sizeable number of States, including Nevada, for allegedly not conforming with the requirements of Section 402(a)(23) of the Act.[14/] All issues respecting the entitlement of NWRO (and individual members of the class it represents) to obtain such relief in a judicial forum will be resolved in that action.

2. What the present case does involve is the extent to which plaintiffs may participate in certain administrative proceedings. Specifically, plaintiffs here contend that they are "entitled as of right to be admitted as parties" in the scheduled conformity hearing. (Brief at 15). In this connection, plaintiffs' claim appears to encompass participation in more than merely the conformity hearing itself. Implicit in their argument is the contention that they are entitled to: decide what issues will be

---

14/ This action bears Civil Action No. 2954-69.

raised at the hearing and the scope of those issues; participate as of right in the Secretary's decision to approve or not approve a State plan; and participate as of right in the negotiations between the Secretary and the State involved. Broadly stated, plaintiffs' claim is that they, as the ultimate beneficiaries of AFDC, are entitled to participate in the administration of that program as co-equals with the Secretary and the State.

In the view of the Secretary, the role of persons or groups affected by public assistance programs is far more modest. It is therefore appropriate to indicate HEW's view of that role.

First, interested persons may not partake as parties in negotiations between State and Federal officials. So far as negotiations are concerned, the role of affected persons is limited to submitting to the Department (or the State) through existing channels their interests and views.

Second, interested persons may not partake as parties in the decision to approve or disapprove State plan materials. As with negotiations, however, interested persons are encouraged to inform the Department of their interests and views.

Third, only the Secretary may decide what issues are to be raised at a conformity hearing and what are the bounds of relevancy therein.

Fourth, once the Secretary has isolated those portions of a States' plan which will be the subject of the hearing, and the hearing has been called, no one except the Secretary and the State will participate as "parties" as of "right", or enjoy the full

panoply of rights which those terms imply. However, affected persons will be accorded an opportunity to participate in the hearing as amicus curiae. Participation in that capacity will vary substantially depending upon the precise nature of the hearing involved. Broadly speaking, an amicus will be permitted to participate to the extent that he can contribute to the making of a proper administrative decision on the issues presented.

If, for example, the question at a hearing is whether the State plan as written conforms with the Act, testimonial or documentary evidence will be largely irrelevant, and the views of affected persons will be susceptible of full expression through oral argument and written briefs. On the other hand, if the hearing involves questions of fact, the participation of an amicus might well be expanded. The principals at the hearing would still be the Secretary and the State, and they alone would have the right to present evidence and cross-examine witnesses. But if affected persons were able to show that they had witnesses present who were able to offer testimony relevant to the issues, this could be allowed in the discretion of the presiding officer at the hearing. Similarly, if it were shown that affected persons could contribute to the making of a sound decision by the cross-examination of witnesses presented by Federal and State agencies, this too could be allowed by the presiding officer. 15/ In short, participation by an amicus

---

15/ Since HEW does not have subpoena power in connection with conformity hearings, neither the parties nor an amicus would be entitled to discover documents or to call witnesses who choose (continued)

would be permitted to the extent that an amicus could add to what was already contributed by the parties, and to the making of a proper decision.

In sum, plaintiffs' participation would not be as of "right", but rather would be in the discretion of the hearing examiner and in all events only on the issues presented. The conformity hearing is essentially a proceeding that focuses on specific issues, and not a forum for airing generalized grievances about the nature of activities involving public assistance programs.

3. The foregoing ground rules are regarded by HEW as reflecting a proper recognition of both the interest of the plaintiffs in the administration of the AFDC program and the necessity for the orderly conduct of conformity proceedings within the framework of sharply defined issues. In the balance of this brief we show that these ground rules are not only reasonable but, as well, fully consistent with the legislative mandate.

In Point I below we demonstrate that, under the clear import of the Social Security Act, plaintiffs have no right to participate in the negotiations between the Secretary and the States involved; that they have no right to veto the Secretary's approval or disapproval of State plan material; and that the Secretary alone has the power to decide what issues will be raised at a conformity hearing.

+

(Footnote 15 continued)

not to testify. HEW has informed us that, in connection with its hearing, the State of Connecticut was told that its request to call the Administrator as a witness would be denied.

In Point II we show why plaintiffs are not entitled to intervene as of right in, and enjoy the full rights of parties to, a conformity hearing.

I.

PLAINTIFFS DO NOT HAVE THE RIGHT TO PARTICIPATE AS PARTIES IN THE ONGOING ADMINISTRATION OF THE AFDC PROGRAM.

A. Background. Consideration of the legal issues in this case requires an understanding of the nature of the process by which the Secretary administers the AFDC program. As noted in the Statement, Section 402 of the Act imposes certain federal requirements with which the State plans must comply. When, as was done in 1967, Congress establishes new requirements by Amendments to Section 402, States must submit new or modified plans which conform with those requirements. At other times, States may choose to change the nature of their plans in the absence of changes in federal law.

Whenever a new State plan is submitted, or an old and already approved plan is modified, there arises the question whether that plan is in conformity with the Act. As part of the continuing administration of AFDC, negotiations--often intricate and extended --take place between Federal and State officials. In the great majority of cases, these negotiations result in the submission by the States of plan material which can be approved by the Secretary. 16/

16/ In 1965 a Senate committee noted that "the actual negotiation process between the Department * * * and the States * * * in nearly all instances results in the development of a State plan or plan amendment that can be approved by the Secretary." S. Rep. No. 404, 89th Cong., 1st Sess. 150 (1965).

If negotiations fail to produce approvable plan material from a State, the administrative sanction then available to the Secretary is to propose the termination of the grant-in-aid to that State. Faced with the prospect of termination, the State would have essentially two alternatives. First it could negotiate with the Secretary regarding the submission of new plan material. If the Secretary were satisfied with that material, he would approve it, and that would mark the end of that disagreement. The States' other alternative would be to refuse to submit approvable material. If the State remained intractable, the Secretary could order termination of grants-in-aid, and the State would be left to administer whatever public assistance program remained with its own funds. In Nevada, this presumably would result in the State's return to the public assistance program, if any, which it administered prior to the time it began participating in AFDC in 1955.

The function of the conformity hearing in the administration of the program is to provide that, before the grant-in-aid is terminated on the basis of a finding of non-conformity, the State must be given an opportunity to be heard. 42 U.S.C. 604(a). 17/

17/ Section 404(a) applies to approved State plans, and under this Section the Secretary calls for a hearing. Section 1116(a) of the Act, 42 U.S.C. 1316(a)(Supp. IV), applies to new plans submitted by the State. It requires the Secretary to "make a determination as to whether [the plan] conforms to the requirements for approval under" the Act. 42 U.S.C. 1316(a)(1) (Supp. IV). If the State is dissatisfied with the Secretary's determination, it may ask the Secretary for a hearing. 42 U.S.C. 1316(a)(2) (Supp. IV). Section 1116(b), 42 U.S.C. 1316(b) (Supp. IV), also provides that a State may treat the submission of amendments to a plan as a new plan "for purposes of subsection (a) * * *". Since the hearings in this case were called by the Secretary, they are governed by the terms of Section 404(a).

The questions to be determined at that hearing are whether, in the particular respects specified by the Secretary, the State plan fails to conform to the Act. The Secretary may notify the State of his belief that its plan fails to conform either as written, or as applied. See 45 C.F.R. 201.5(a). When the State is charged with a failure properly to apply its plan, the hearing would be a largely evidentiary one. In fact, however, the proposed Connecticut and Nevada hearings are concerned almost exclusively with the States' failure to include plan material or with objections to plan material as it was written.

In the Nevada hearing, for example, the issues are whether the State plan has made provision for 1) participation in the WIN Program; 2) the disregard of certain income; and 3) the availability of certain day care services to parents. These questions of conformity will be readily determinable by a comparison of the Federal requirements and the specific provisions of the State plan. The issues in the proposed Connecticut hearing, which will involve both AFDC and other public assistance programs, are more complicated. But here, too, the disputed matters are largely of a legal --not an evidentiary--nature. Indeed, the relevant facts have already been stipulated by the State and Federal officials involved (J.A. 135). In this hearing, testimony may prove to be helpful if, e.g., a question arises as to the meaning of a State plan provision. The interpretation of that provision by the State officials, or testimony as to the way it was being administered, may be relevant to the question whether the Connecticut plan

is in conformity. To a large extent, however, these hearings will not require evidentiary testimony. Indeed HEW, which had the burden of proof on the question of non-conformity, did not plan to put on any witnesses at the time of the abortive institution of the Connecticut hearing.

It also should be noted that, even when a hearing is called, negotiations with the State can be expected to continue before, during and after the hearing. This is acknowledged by the federal regulations which provide that the calling of a hearing "does not foreclose further negotiations with State officials". 45 C.F.R. 201.5(c). It is these negotiations, more than the hearing itself, that may be expected to result in the submission of approvable plan material. In short, the hearing is only a part of the larger, continuing process in which the Secretary negotiates with the States to insure that their plans conform to the requirements of the Act.

B. Negotiations. We believe it to be abundantly clear that the process of review and approval of State plan submittals and the attendant negotiations between the Federal and State agencies are a matter between only those agencies. This is the obvious import of the Social Security Act. For that Act established public assistance programs to be administered by the Secretary and by the States involved. Not the slightest mention is made of the possibility that any other "party" or interested groups might participate in the administration of the program on a basis equal to that of the Secretary or the State. The reasons why Congress should have chosen so to limit participation in the administration

of AFDC are not difficult to perceive.

If the present scheme of two-party negotiations--complicated as they are--were turned into multi-party processes, this would seriously dilute the ability of the agency to carry out its duties and cripple the effective and orderly administration of public assistance programs. Negotiations often would never even begin. And, even if they did, it is unlikely that they would get very far, because no decisions could be made without the concurrence of all the parties.

In this connection, it should be noted that the individuals and groups who have some interest in the outcome of negotiations are numerous and diverse. This is illustrated by the fact that when, in 1968, Georgia called for a hearing pursuant to 42 U.S.C. 1316(a)(2) (Supp. IV) for a reconsideration of the Administrator's determination that an amendment to its AFDC plan was not approvable, at least three separate groups--each with presumably different interests--asked to participate as parties in the conformity hearing. 18/ Furthermore, the interests of different members of an organization could be expected to conflict. Plaintiffs suggest that this is true in the NWRO. On the one hand, some NWRO members would be opposed to a determination of non-conformity by the Secretary "because Nevada may have its Federal funds cut-off requiring a reduction or elimination of assistance" to AFDC recipients. (Brief at 25). Other members, however, would favor a determination

---

18/ The groups were the NWRO, the Atlanta Legal Aid Society, Inc., and the Emory Legal Services Center. (J.A. 32)

of non-conformity because of their belief that "the cut-off of Federal funds is one of the principal devices authorized by the Congress for the protection of [the] rights Congress afforded poor people." (Brief at 6). It is well to remember, too, that AFDC is not the only public assistance program; the others also affect numerous individuals and groups. In the conformity hearing involving Connecticut, the Connecticut Hospital Association asked to participate as amicus curiae because of its interest in the States' Medical Assistance ("MA") Program. 19/

In a word, the obvious import of the Act is that negotiations are a matter for the Secretary and the States alone.

C. Approval of Plans. Just as the Social Security Act cannot reasonably be read as giving plaintiffs a statutory right to participate in negotiations between the Secretary and the State, so, too, the Act confers no right upon them to participate in the subsequent decision whether State plan material shall be approved. And for good reasons. If interested persons could exercise a veto-power over the approval or disapproval of State plan material, the consequences would be serious indeed. In these circumstances the Secretary could not, for example, decide to approve State plan material if another party to the negotiations objected. This would leave the question of the approval of the State plan in a state of suspension--with the result that the individuals who would otherwise receive the benefits of the State's program would be

---

19/ Under the Connecticut's MA program, the State makes payments directly to hospitals which provide care for recipients. This commonly followed method of making payments is permitted by the Secretary under 42 U.S.C. 2105(a) (Supp. IV).

denied public assistance payments. 20/ At the same time, the Secretary could not disapprove State plan material without the concurrence of third "parties". In short, no decision to approve or disapprove plan material could become finalized until the termination of a lengthy process of court review.

Stated otherwise, it would be completely contrary to effective and orderly program administration if any outside group had the power to veto the Secretary's decision on the approval or disapproval of State plan material and, by so doing, leave unsettled for a considerable period what had already been settled by the Federal and State agencies responsible under the Act for administering public assistance programs. It is not surprising, then, that the question as to whether a State plan should be approved is a matter which the Act leaves to the Secretary alone. 42 U.S.C. 602(b).

D. Issues Raised at a Hearing. When the Administrator scheduled the conformity hearing involving Nevada, she gave the State notice of her expectation that the hearing would deal with three issues: whether the State's plan conformed with a) section 402(a)(19), b) section 402(a)(8)(A)(ii), and c) sections 492(a)(14)-(15) of the Act. In their letter to the Administrator, plaintiffs indicated unequivocally their intention to expand upon

---

20/ Under Section 1116(a)(1), 42 U.S.C. 1316(a)(1) (Supp. IV), the Secretary may disapprove new State plan material. Under Sections 1116(b)(2) and (3) the State, if dissatisfied with the Secretary's decision, may petition him for reconsideration and, if that fails, seek judicial review of his decision. Section 1116(c) provides that "[a]ction pursuant to an initial determination of the Secretary in subsection (a) shall not be stayed pending reconsideration * * *".

those issues if permitted to intervene (J.A. 41-42). In their brief, plaintiffs claim that "Nevada is by HEW's own standards not in conformity on 402(a)(23) and yet that issues (sic) is not included in the hearing." 21/ (Brief at 15). In fact they apparently claim that there should be no "limit to the issues which plaintiffs wish to raise at the hearing * * *" (Brief at 8).

The short answer to plaintiffs' insistence that they have the right to determine the issues to be encompassed at the hearing is that the Secretary alone has been given the power to decide what plan provisions are approved, what provisions remain negotiable, and what provisions should be raised at the hearing. The congressional direction that "the Secretary [shall give] * * * notice * * * to the State", 42 U.S.C. 604(a) (Supp. IV), is an acknowledgment of this fact. 22/ Obviously, in order for that notice to be meaningful, it must apprise the State as to precisely what issues will be considered.

In this regard, it makes no difference whether plaintiffs are able to establish a right to intervene in the conformity hearing. For it is well settled that an intervenor is "limited to the field of litigation open to the original parties." Chandler & Price Co. v. Brandtjen & Kluge, Inc., 296 U.S. 53, 58. "[O]ne of the most usual

---

21/ Though plaintiffs probably had no way of knowing this at the time their brief was written, this statement is factually incorrect. Negotiations between the Administrator and the State have resulted in the State's submission of plan material which was approved on December 29, 1969.

22/ If the State calls for a hearing pursuant to Section 1116, 42 U.S.C. 1316 (Supp. IV), it would have the power to decide what issues would be raised.

procedural rules is that an intervenor is admitted to the proceeding as it stands, and in respect of the pending issues, but is not permitted to enlarge those issues or compel an alteration of the nature of the proceeding." Vinson v. Washington Gas Co., 321 U.S. 489, 498 (1944). Eastern Air Lines v. C.A.B., 101 U.S. App. D.C. 562, 247 F. 2d 562 (1957); Seaboard & Western Airlines v. C.A.B., 86 U.S. App. D.C. 64, 181 F. 2d 515 (1949), certiorari denied, 339 U.S. 963. See Columbia Gas Corp. v. American Fuel Co., 322 U.S. 379, 383 (1944). Cf. I.C.C. v. Jersey City, 322 U.S. 503, 523-524 (1944). Plainly, therefore, only the Secretary has the power to decide what issues shall be raised at the hearing. 23/

23/ If the rule were otherwise, and intervenors or outside parties were permitted to define the scope of the issues or determine the bounds of relevancy, there would be a substantial threat of converting the conformity hearing into a forum for the airing of generalized grievances about the nature of public assistance programs. This clearly was not the legislative understanding of the purpose which the hearings should serve.

II.

PLAINTIFFS ARE NOT ENTITLED TO INTERVENE AS PARTIES IN A CONFORMITY HEARING.

A. The Social Security Act Precludes the Participation in a Conformity Hearing As A Party Of Anyone But the Secretary and the State Involved.

1. By necessary implication, Congress has limited participation in a conformity hearing as a party to the Secretary and the State involved. That is the plain import of Section 404(a) of the Act. For while that Section makes specific reference to two legal persons--the "Secretary" and the "State"--it makes no mention at all of any other potential participant in a conformity hearing. Had Section 404(a) referred to potential "parties", plaintiffs could at least argue that they came within the meaning of that term. The failure of Congress to make such a reference indicates that it intended that only the Secretary and the State would be parties to the hearing.

This conclusion is buttressed by an examination of the purpose of Section 404(a). That Section was motivated solely by a desire to afford procedural protections to States threatened with the termination of federal grants-in-aid. Indeed, it is entitled: "Stopping Payments on Deviation From Required Provisions of Plan or Failure to Comply Therewith". It was in the context of providing the Secretary with this power to stop payments--a power which, by anyone's view, is drastic--that the Congress imposed safeguards on that power's use. Accordingly, Congress gave the subject State an opportunity for a hearing before the termination of grants-in-aid occurred, thus insuring that the Secretary's decision would be a

considered one. But this protection was intended solely for the benefit of the State involved--not for anyone else.

2. This reading of the statutory terms is also supported by the legislative history of Section 404(a). The Senate Report to the Social Security Act of 1935 described that section as follows:

> A State with an approved plan will not receive payments if the Secretary * * * finds that the State is not substantially complying with its plan. The House bill has been amended by assuring that the Secretary's finding shall be made only after the State has had "reasonable" notice and opportunity for hearing.

Sen. Rep. No. 628, 74th Cong., 1st Sess., p. 36. And the Senate's view of the function of a Section 404(a) conformity hearing was fully shared by the House. Thus the conference report to the Social Security Bill, H.R. Rep. No. 1540, 74th Cong., 1st Sess., pp. 8-9, when describing the Senate's amendment to the House bill, stated:

> The House bill provided that the [Secretary], before stopping payments to a state for aid to dependent children on the ground that the State plan is not being complied with, should give notice and opportunity for hearing to the State agency. The Senate amendment provides that the notice and opportunity for hearing must be "reasonable." The House recedes.

3. In addition to the language of Section 404(a) and its legislative history, the administrative agency's long standing interpretation of the statute supports our position. In her affidavit of December 16, 1969, the Administrator indicated that HEW's consistent practice has been to deny the request of anyone other than the State to participate as parties, but, in the exercise of discretion, to permit interested persons to appear as amicus

curiae. (J.A. 31-32). In that affidavit she referred to specific hearings in which this practice had been followed. (J.A. 32). In her letter to the NWRO dated January 14, 1970, she summarized the agency's interpretation of the statute, explaining that:

> * * * [I]n our view the hearing is based on specific provisions of the Social Security Act which refer directly and exclusively to the Department of Health, Education, and Welfare on the one hand and the States on the other. Accordingly, we have consistently taken the position that the State and Federal government are the only parties as of right in the proceedings. We have not recognized other parties and, in accordance with our consistent practice, your requests to participate as a party in the Connecticut hearing and in settlement negotiations are denied. [J.A. 98].

At the very least, the agency's consistent construction of the Act is entirely reasonable. Thus, the Supreme Court's observation in Udall v. Tallman, 380 U.S. 1, 16 (1965) is fully applicable:

> * * * this Court shows great deference to the interpretation given the statute by the officers or agency charged with its administration. "To sustain the [Secretary's] application of this statutory term, we need not find that its construction is the only reasonable one, or even that it is the result we would have reached had the question arisen in the first instance in judicial proceedings." Unemployment Comm'n v. Aragon, 329 U.S. 143, 153. See also, e.g., Gray v. Powell, 314 U.S. 402; Universal Battery Co. v. United States, 381 U.S. 580, 583. "Particularly is this respect due when the administrative practice at stake 'involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new.'" Power Reactor Co. v. Electricians, 367 U.S. 396, 408. [Emphasis supplied.]

B. In Any Event, Plaintiffs Have Not Shown A Constitutional or Statutory Right to Intervene As Parties.

Since as we have seen, the Social Security Act itself does not confer any right upon plaintiffs to participate in conformity hearings, if such a right exists it must be derived from some other source. Contrary to plaintiffs' insistence, however, neither the Constitution nor the Administrative Procedure Act confers an entitlement to participate as parties. Similarly, their claim of a common-law right is devoid of merit.

1. Due Process. Plaintiffs contend (Brief at 12-15) that the Due Process clause gives them a right to participate in the hearing as parties. As best we are able to understand this claim, their argument appears to be that, since they have an alleged legal interest in State compliance with the provisions of the Social Security Act, they have a constitutional right to protect that interest by participation in any administrative proceeding concerned with the question of such compliance.

If plaintiffs have any legal interest in State compliance with the conditions imposed by Congress with respect to a federally financed assistance program, that interest necessarily must be derived from the statute establishing those conditions. In the context of this case, plaintiffs obviously did not have a constitutional right to insist upon the enactment of the new statutory conditions respecting the AFDC program which were included in the 1967 Amendments to the Social Security Act. This being so, they have no legal interest of constitutional proportions in the observance of those conditions. In these circumstances, whatever rights plaintiffs

may have to participate in proceedings devoted solely to the question of State compliance must have a statutory basis. But, as we have seen, Congress has not chosen to confer rights of this kind insofar as conformity hearings are concerned. Rather, the legislative choice was to have the matter of the observance of the statutory conditions resolved in a proceeding to which only the involved State and the Secretary were to be parties as of right.

In sum, having imposed the requirements upon the States, it was for Congress to decide how and by whom those requirements should be enforced. There is nothing in the Constitution which requires that plaintiffs be made a party to the enforcement proceedings despite the fact that Congress saw no reason to confer such a right upon them. 24/

24/ Flemming v. Nestor, 363 U.S. 603 (1960), upon which plaintiffs rely, is entirely inapposite. At issue there was the constitutionality of provisions of the Social Security Act terminating the eligibility for social security benefits of deported persons. That the plaintiff there had a constitutionally protected interest in not being arbitrarily deprived by statute of his prior social security coverage--which interest could be asserted in a judicial forum--scarcely has any bearing upon the question here. In this connection, plaintiffs do not, as they cannot, claim that Nevada's administration of the AFDC program violates their constitutional rights. And, in any event, such a claim would not be cognizable in a conformity hearing which, we stress again, is only concerned with the question as to whether the State is complying with all statutory requirements.

2. The APA. Plaintiffs point to a provision of the Administrative Procedure Act, 5 U.S.C. 554(c) (Supp. IV), which provides that in adjudicatory hearings the agency shall give "interested parties opportunity for--* * * (2) * * * hearing and decision on notice * * *." 5 U.S.C. 551(3) (Supp. IV) defines a "party" as "a person * * * properly seeking and entitled as of right to be admitted as a party" in agency proceedings. But this section scarcely confers any right of intervention. Rather, it simply acknowledges the status of party of persons who have derived the "right to be admitted as a party" from some other source. See Office of Communication of United Church of Christ v. F.C.C., 123 U.S. App. D.C. 328, 336 , 359 F. 2d 994, 1002 (1966). Since there is no other such source, the APA is inapplicable.

Plaintiffs' reliance upon decisions involving applications for intervention before agencies like the Federal Communications Commission is similarly misplaced. In both Church of Christ, supra, and American Communication Association v. United States, 298 F. 2d 648 (C.A. 2, 1962) there was a statute which granted the right to judicial review to "persons aggrieved". In each case the Court determined that since plaintiffs fell within that category, they were entitled to intervene in the agency to make the right to judicial review effective. Plaintiffs are, of course, unable to point to a "persons aggrieved" statute here. The failure of Congress to enact such a statute in connection with public assistance programs is especially significant, because Congress hardly could have been unaware of the interests of individual

recipients in the outcome of conformity hearings.

What is perhaps more significant, the function of the FCC in licensing cases and that of HEW in a conformity hearing are entirely different. In a licensing proceeding, the FCC acts as arbiter of the "public interest", and the views of representatives of any segment of the public are relevant. In a conformity hearing, the only question is whether the State's plan conforms with the Act. If it does, the State may continue to receive grants-in-aid. If it does not, the Secretary may terminate payments to the State. And, although the Secretary could be expected to give careful consideration to the interests and views of welfare recipients, he could order a termination of grants-in-aid irrespective of whether those recipients favored, opposed, or were otherwise disposed to the termination.

3. Judicial Review. Plaintiffs also urge (Brief at 23-31) that they should be entitled to intervene in the conformity hearing because they have the right to obtain judicial review of that hearing's outcome. Their asserted right to judicial review is rested on Section 702 of the APA, 5 U.S.C. 702 (Supp. IV), which provides:

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.

But the difficulty with this argument is that it depends upon demonstrating the right to intervene as a party. For if there is no such right, plaintiffs will neither suffer "legal wrong" nor be "aggrieved by agency action within the meaning of a relevant

statute". As we have seen, plaintiffs are not covered by a "persons aggrieved" statute, and therefore have suffered no "legal wrong". And, since they have pointed to no other statute granting intervention, they have not been "aggrieved by agency action within the meaning of a relevant statute".

Even more persuasive than the fact that plaintiffs have not shown a right to judicial review, is the fact that Congress has precluded review of a conformity hearing by anyone but the State involved. Only recently, in the 1965 Amendments to the Act, Congress addressed itself to the question of review and enacted a new Section 1116. It pertinently provides:

> Any State which is dissatisifed with * * * a final determination of the Secretary under section [404] * * * may * * * file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination.

42 U.S.C. § 1316(a)(3) (Supp. IV) (emphasis supplied). The Senate Committee which reported the 1965 Amendments explained the purpose of these review provisions:

> The committee bill contains new provisions * * * for * * * judicial review of certain administrative determinations under [AFDC] * * *. These provisions are designed to assure * * * that the States will be able to obtain judicial review of their plan proposals at an appropriate stage of the proceedings.

Coming, as it does, in the specific context of a conformity hearing, and about thirty years after Section 404(a) was originally enacted, Section 1116 can only be taken as a rejection by Congress of the view that anyone but the State involved may seek review of a conformity hearing's outcome. As we stressed earlier, supra,

pp. 27-28, any other result would permit private organizations or individuals to obstruct the enforcement of decisions made by the Federal agency responsible for administering AFDC. In the enactment of Section 1116, therefore, Congress must have intended to preclude a result which might so seriously disrupt the effective and orderly administration of that program.

4. Common Law. Lastly, plaintiffs argue (Brief at 31-35) that, even if they have no Constitutional or statutory right to participate as parties in the conformity hearing, the common law mandates that result. The short answer is that agency procedures are governed exclusively by statute and regulation--not the common law.

CONCLUSION

For the reasons stated, we respectfully request that this Court should affirm the orders of the district court denying plaintiffs' motions for interlocutory injunctive relief.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ALAN S. ROSENTHAL,
RAYMOND D. BATTOCCHI,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

FEBRUARY 1970.

STATUTORY APPENDIX

STATUTORY APPENDIX

The Social Security Act, 42 U.S.C. (Supp. IV), pertinently provides:

SUBCHAPTER IV.—GRANTS TO STATES FOR AID AND SERVICES TO NEEDY FAMILIES WITH CHILDREN AND FOR CHILD-WELFARE SERVICES

PART A.—AID TO FAMILIES WITH DEPENDENT CHILDREN

§ 601. Appropriations.

For the purpose of encouraging the care of dependent children in their own homes or in the homes or relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children. (As amended Jan. 2, 1968, Pub. L. 90-248, title II, § 241(b)(1), 81 Stat. 916.)

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary.

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to supervise the administration of the plan; (4) provide for granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide (A) such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan and (B) for the training and effective use of paid subprofessional staff, with particular emphasis on the full-time or part-time employment of recipients and other persons of low income, as community services aides, in the administration of the plan and for the use of nonpaid or partially paid volunteers in a social service volunteer program in providing services to applicants and recipients and in assisting any advisory committees established by the State agency; and (6) provide that the State agency will make such reports, in such form and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 632(b)(2) and (3) of this title; and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and (ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons specified in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the income of the persons so specified (within the meaning of clause (7)) was in excess of their need as determined by the State agency pursuant to claues (7) (without regard to clause (8), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan; (9) provide safeguards which restrict the use or disclosure of information concerning applicants and recipients to purposes directly connected with the administration of aid to families with dependent children; (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to dependent children shall be furnished with reasonable promptness to all eligible individuals; (11) effective July 1, 1952, provide for prompt notice to appropriate law-enforcement officials of the furnishing of aid to families with dependent children in respect of a child who has been deserted or abandoned by a parent; (12) provide, effective October 1, 1950, that no aid will be furnished any individual under the plan with respect to any period with respect to which he is receiving old-age assistance under the State plan approved under section 302 of this title; (13) provide a description of the services which the State agency makes available to maintain and strengthen family life for children, including a description of the steps taken to assure, in the provision of such services, maximum utilization of other agencies providing similar or related services; (14) provide for the development and application of a program for such family services, as defined in section 606(d) of this title, and child-welfare services, as defined in section 625 of this title, for each child and relative who receives aid to families with dependent children, and each appropriate individual (living in the same home as a relative and child receiving such aid whose needs are taken into account in making the determination under clause (7)), as may be necessary in the light of the particular home conditions and other needs of such child, relative, and individual, in order to assist such child, relative, and individual to attain or retain capability for self-support and care and in order to maintain and strengthen family life and to foster child development; (15) provide—

(A) for the development of a program for each appropriate relative and dependent child receiving aid under the plan, and each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), with the objective of—

(i) assuring, to the maximum extent possible, that such relative, child, and individual will enter the labor force and accept employment so that they will become self-sufficient, and

(ii) preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life,

(B) for the implementation of such programs by—

(i) assuring that such relative, child, or individual who is referred to the Secretary of Labor pursuant to clause (19) is furnished child-care services and that in all appropriate cases family planning services are offered them, and

(ii) in appropriate cases, providing aid to families with dependent children in the form of payments of the types described in section 606(b)(2) of this title, and

(C) that the acceptance by such child, relative, or individual of family planning services provided under the plan shall be voluntary on the part of such child, relative, or individual and shall not be a prerequisite to eligibility for or the receipt of any other service or aid under the plan,

(D) for such review of each such program as may be necessary (as frequently as may be necessary, but at least once a year) to insure that it is being effectively implemented.

(E) for furnishing the Secretary with such reports as he may specify showing the results of such programs, and

(F) to the extent that such programs under this clause or clause (14) are developed and implemented by services furnished by the staff of the State agency or the local agency administering the State plan in each of the political subdivisions of the State, for the establishment of a single organizational unit in such State or local agency, as the case may be, responsible for the furnishing of such services;

(16) provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State, providing such data with respect to the situation it may have; (17) provide—

(A) for the development and implementation of a program under which the State agency will undertake—

(i) in the case of a child born out of wedlock who is receiving aid to families with dependent children, to establish the paternity of such child and secure support for him, and

(ii) in the case of any child receiving such aid who has been deserted or abandoned by his parent, to secure support for such child from such parent (or from any other person legally liable for such support), utilizing any reciprocal arrangements adopted with other States to obtain or enforce court orders for support, and

(B) for the establishment of a single organizational unit in the State agency or local agency administering the State plan in each political subdivision which will be responsible for the administration of the program referred to in clause (A);

(18) provide for entering into cooperative arrangements with appropriate courts and law enforcement officials (A) to assist the State agency in administering the program referred to in clause (17)(A), including the entering into of financial arrangements with such courts and officials in order to assure optimum results under such program, and (B) with respect to any other matters of common concern to such courts or officials and the State agency or local agency administering the State plan;

(19) provide—

(A) for the prompt referral to the Secretary of Labor or his representative for participation under a work incentive program established by part C of—

(i) each appropriate child and relative who has attained age sixteen and is receiving aid to families with dependent children,

(ii) each appropriate individual (living in the same home as a relative and child receiving such aid) who has attained such age and whose needs are taken into account in making the determination under section 602(a)(7) of this title, and

(iii) any other person claiming aid under the plan (not included in clauses (i) and (ii), who, after being informed of the work incentive programs established by part C, requests such referral unless the State agency determines that participation in any of such programs would be inimical to the welfare of such person or the family;

except that the State agency shall not so refer a child, relative, or individual under clauses (i) and (ii) if such child, relative, or individual is—

(iv) a person with illness, incapacity, or advanced age,

(v) so remote from any of the projects under the work incentive programs established by part C that he cannot effectively participate under any of such programs,

(vi) a child attending school full time, or

(vii) a person whose presence in the home on a substantially continuous basis is required because of the illness or incapacity of another member of the household:

(B) that aid under the plan will not be denied by reason of such referral or by reason of an individual's participation on a project under the program established by section 632(b)(2) or (3) of this title;

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of 20 per centum of the cost of such programs, as specified in section 635(b) of this title;

(D) that (i) training incentives authorized under section 634 of this title, and income derived from a special work project under the program established by section 632(b)(3) of this title shall be disregarded in determining the needs of an individual under section 602(a)(7) of this title, and (ii) in determining such individual's needs the additional expenses attributable to his participation in a program established by section 632(b)(2) or (3) of this title shall be taken into account:

(E) that, with respect to any individual referred pursuant to subparagraph (A) who is participating in a special work project under the program established by section 632(b)(3) of this title, (i) the State agency, after proper notification by the Secretary of Labor, will pay to such Secretary (at such times and in such manner as the Secretary of Health, Education, and Welfare prescribes) the money payments such State would otherwise make to or on behalf of such individual (including such money payments with respect to such individual's family), or 80 per centum of such individual's earnings under such program, whichever is lesser and (ii) the State agency will supplement any earnings received by such individual by payments to such individual (which payments shall be considered aid under the plan) to the extent that such payments when added to the individual's earnings from his participation in such special work project will be equal to the amount of the aid that would have been payable by the State agency with respect to such individual's family had he not participated in such special work project, plus 20 per centum of such individual's earnings from such special work project; and

(F) that if and for so long as any child, relative, or individual (referred to the Secretary of Labor pursuant to subparagraph (A)(i) and (ii) and section 607(b)(2) of this title) has been found by the Secretary of Labor under section 633(g) of this title to have refused without good cause to participate under a work incentive program established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 606(b)(2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days, make payments of the type described in section 606(b)(2) of this title (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor; (20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title; (21) provide that the State agency will report to the Secretary, at such times (not less often than once each calendar quarter) and in such manner as the Secretary may prescribe—

(A) the name, and social security account number, if known, of each parent of a dependent child or children with respect to whom aid is being provided under the State plan—

(i) against whom an order for the support and maintenance of such child or children has been issued by a court of competent jurisdiction but who is not making payments in compliance or partial compliance with such order, or against whom a petition for such an order has been filed in a court having jurisdiction to receive such petition, and

(ii) whom it has been unable to locate after requesting and utilizing information included in the files of the Department of Health, Education, and Welfare maintained pursuant to section 405 of this title,

(B) the last known address of such parent and any information it has with respect to the date on which such parent could last be located at such address, and

(C) such other information as the Secretary may specify to assist in carrying out the provisions of section 610 of this title;

(22) provide that the State agency will, in accordance with standards prescribed by the Secretary, cooperate with the State agency administering or supervising the administration of the plan of another State under this part—

(A) in locating a parent residing in such State (whether or not permanently) against whom a petition has been filed in a court of competent jurisdiction of such other State for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State, and

(B) in securing compliance or good faith partial compliance by a parent residing in such State (whether or not permanently) with an order issued by a court of competent jurisdiction against such parent for the support and maintenance of a child or children of such parent with respect to whom aid is being provided under the plan of such other State; and (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

• • • • •

(c) The Secretary shall, on the basis of his review of the reports received from the States under clause (15) of subsection (a) of this section; compile such data as he believes necessary and from time to time publish his findings as to the effectiveness of the programs developed and administered by the States under such clause. The Secretary shall annually report to the Congress (with the first such report being made on or before July 1, 1970) on the programs developed and administered by each State under such clause (15). (As amended July 30, 1965, Pub. L. 89–97, title IV, §§ 403(b), 410, 79 Stat. 418, 423; Jan. 2, 1968, Pub. L. 90–248, title II, §§ 201(a), (b), 202(a), (b), 204(b), (e), 205(a), 210(a)(2), 211(a), 213(b), 81 Stat. 877, 879, 881, 890, 892, 895, 896, 898.)

§ 603. Payment to States; computation of amounts.

(a) From the sums appropriated therefor, the Secretary of the Treasury shall (subject to subsection (d) of this section) pay to each State which has an approved plan for aid and services to needy families with children, for each quarter, beginning with the quarter commencing October 1, 1958—

(1) in the case of any State other than Puerto Rico, the Virgin Islands, and Guam, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof)—

(A) five-sixths of such expenditures not counting so much of any expenditure with respect to any month as exceeds the product of $18 multiplied by the total number of recipients of aid to families with dependent children for such month (which total number, for purposes of this subsection means (i) the number of individuals with respect to whom such aid in the form of money payments is paid for such month, plus (ii) the number of other individuals with respect to whom expenditures were made in such month as aid to families with dependent children in the form of medical or any other type of remedial care, plus (iii) the number of individuals, not counted under clause (i) or (ii), with respect to whom payments described in section 606(b)(2) of this title are made in such month and included as expenditures for purposes of this paragraph or paragraph (2)); plus

(B) the Federal percentage of the amount by which such expenditures exceed the maximum which may be counted under clause (A), not counting so much of any expenditure with respect to any month as exceeds (i) the product of $32 multiplied by the total number of recipients of aid to families with dependent children (other than such aid in the form of foster care) for such month, plus (ii) the product of $100 multiplied by the total number of recipients of aid to families with dependent children in the form of foster care for such month; and

(2) in the case of Puerto Rico, the Virgin Islands, and Guam, an amount equal to one-half of the total of the sums expended during such quarter as aid to families with dependent children under the State plan (including expenditures for premiums under part B of subchapter XVIII of this chapter for individuals who are recipients of money payments under such plan and other insurance premiums for medical or any other type of remedial care or the cost thereof), not counting so much of any expenditure with respect to any month as exceeds $18 multiplied by the total number of recipients of such aid for such month; and

(3) in the case of any State, an amount equal to the sum of the following proportions of the total amounts expended during such quarter as found necessary by the Secretary of Health, Education, and Welfare for the proper and efficient administration of the State plan—

(A) 75 per centum of so much of such expenditures as are for—

(i) any of the services described in clauses (14) and (15) of section 602(a) of this title which are provided to any child or relative who is receiving aid under the plan, or to any other individual (living in the same home as such relative and child) whose needs are taken into account in making the determination under clause (7) of such section,

(ii) any of the services described in clauses (14) and (15) of section 602(a) of this title which are provided to any child or relative who is applying for aid to families with dependent children or who, within such period or periods as the Secretary may prescribe, has been or is likely to become an applicant for or recipient of such aid, or

(iii) the training of personnel employed or preparing for employment by the State agency or by the local agency administering the plan in the political subdivision; plus

(B) one-half of the remainder of such expenditures.

The services referred to in subparagraph (A) shall include only—

(C) services provided by the staff of the State agency, or of the local agency administering the State plan in the political subdivision: *Provided*, That no funds authorized under this part shall be available for services defined as vocational rehabilitation services under the Vocational Rehabilitation Act (i) which are available to individuals in need of them under programs for their rehabilitation carried on under a State plan approved under such Act, or (ii) which the State agency or agencies administering or supervising the administration of the State plan approved under such Act are able and willing to provide if reimbursed for the cost thereof pursuant to agreement under subparagraph (D), if provided by such staff, and

(D) subject to limitations prescribed by the Secretary, services which in the judgment of the State agency cannot be as economically or as effectively provided by the staff of such State or local agency and are not otherwise reasonably available to individuals in need of them, and which are provided, pursuant to agreement with the State agency, by the State health authority or the State agency or agencies administering or supervising the administration of the State plan for vocational rehabilitation services approved under the Vocational Rehabilitation Act or by any other State agency which the Secretary may determine to be appropriate (whether provided by its staff or by contract with public (local) or nonprofit private agencies);

except that services described in clause (ii) of subparagraph (E) hereof may be provided only pursuant to agreement with such State agency or agencies administering or supervising the administration of the State plan for vocational rehabilitation services so approved; and except that, to the extent specified by the Secretary, child-welfare services, family planning services, and family services may be provided from sources other than those referred to in subparagraphs (C) and (D). The portion of the amount expended for administration of the State plan to which subparagraph (A) applies and the portion thereof to which subparagraph (B) applies shall be determined in accordance with such methods and procedures as may be permitted by the Secretary.

(4) Repealed. Pub. L. 90–248, title II, § 201(e)(3), Jan. 2, 1968, 81 Stat. 880.

(5) in the case of any State, an amount equal to the sum of—

(A) 50 per centum of the total amount expended under the State plan during such quarter as emergency assistance to needy families with children in the form of payments or care specified in paragraph (1) of section 606(e) of this title, and

(B) 75 per centum of the total amount expended under the State plan during such quarter as emergency assistance to needy families with children in the form of services specified in paragraph (1) of section 606(e) of this title.

The number of individuals with respect to whom payments described in section 606(b)(2) of this title are made for any month, who may be included as recipients of aid to families with dependent children for purposes of paragraph (1) or (2), may not exceed 10 per centum of the number of other recipients of aid to families with dependent children for such month. In computing such 10 percent, there shall not be taken into account individuals with respect to whom such payments are made for any month in accordance with section 602(a)(19)(F) of this title.

• • • • • •

(c) Repealed. Pub. L. 90–248, title II, § 201(e)(1), Jan. 2, 1968, 81 Stat. 880.

(d)(1) Notwithstanding any other provision of this chapter (except the succeeding paragraphs of this subsection), the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section may be made to a State for any calendar quarter after June 30, 1969, shall not exceed the number which bears the same ratio to the total population of such State under the age of 18 on the first day of the year in which such quarter falls as the average monthly number of such dependent children under the age of 18 with respect to whom payments under this section were made to such State for the calendar quarter beginning January 1, 1968, bore to the total population of such State under the age of 18 on that date.

(2) In the case of any State which is determined by the Secretary to have effectuated, in compliance with or in reliance upon or in consideration of a judicial decision (as defined in paragraph (3)), a policy of providing aid to families with dependent children under its State plan approved under this part to or on behalf of individuals who, except for such policy, would not be eligible for such aid, the average monthly number of dependent children under the age of 18 who have been deprived of parental support or care by reason of the continued absence from the home of a parent with respect to whom payments under this section were made to the State for the calendar quarter beginning January 1, 1968, shall, for purposes of applying the provisions of paragraph (1), be increased by the average monthly number, in the calendar quarter beginning April 1, 1969, of children under the age of 18 who are deprived of parental support or care by reason of the continued absence from the home of a parent and who by reason of such policy began to receive such aid after March 1968 and received such aid during the calendar quarter beginning April 1, 1969.

(3) As used in paragraph (2), the term "judicial decision" means any decision by a court of the United States of competent jurisdiction in any case or controversy in which there is decided the issue of the validity, under the United States Constitution, of any law, rule, regulation, or policy of a State under which aid to families with dependent children is denied to individuals otherwise eligible therefor because of failure to meet duration of residence requirements or because of the relationship

between a male individual and the mother of the child or children with respect to whom such aid is sought. (As amended July 30, 1965, Pub. L. 89-97, title I, § 122, title IV, § 401(c), 79 Stat. 353, 415; Jan. 2, 1968, Pub. L. 90-248, title II, §§ 201(c)—(e), 205(b), 206(a), 207(b), 208, 241(b) (2), (3), 81 Stat. 879, 880, 892—894, 916; June 28, 1968, Pub. L. 90-364, title III, § 301, 82 Stat. 273.)

§ 604. Stopping payments on deviation from required provisions of plan or failure to comply therewith.

(a) In the case of any State plan for aid and services to needy families with children which has been approved by the Secretary, if the Secretary, after reasonable notice and opportunity for hearing to the State agency administering or supervising the administration of such plan, finds—

(1) that the plan has been so changed as to impose any residence requirement prohibited by section 602(b) of this title, or that in the administration of the plan any such prohibited requirement is imposed, with the knowledge of such State agency, in a substantial number of cases; or

(2) that in the administration of the plan there is a failure to comply substantially with any provision required by section 602(a) of this title to be included in the plan;

the Secretary shall notify such State agency that further payments will not be made to the State (or in his discretion, that payments will be limited to categories under or parts of the State plan not affected by such failure) until the Secretary is satisfied that such prohibited requirement is no longer so imposed, and that there is no longer any such failure to comply. Until he is so satisfied he shall make no further payments to such State (or shall limit payments to categories under or parts of the State plan not affected by such failure).

(b) No payment to which a State is otherwise entitled under this part for any period before September 1, 1962, shall be withheld by reason of any action taken pursuant to a State statute which requires that aid be denied under the State plan approved under this part with respect to a child because of the conditions in the home in which the child resides; nor shall any such payment be withheld for any period beginning on or after such date by reason of any action taken pursuant to such a statute if provision is otherwise made pursuant to a State statute for adequate care and assistance with respect to such child. (As amended Jan. 2, 1968, Pub. L. 90-248, title II, §§ 241(b)(4), 245, 81 Stat. 916, 918.)

§ 606. Definitions.

When used in this part—

(a) The term "dependent child" means a needy child (1) who has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, and who is living with his father, mother, grandfather, grandmother, brother, sister, stepfather, stepmother, stepbrother, stepsister, uncle, aunt, first cousin, nephew, or niece, in a place of residence maintained by one or more of such relatives as his or their own home, and (2) who is (A) under the age of eighteen, or (B) under the age of twenty-one and (as determined by the State in accordance with standards prescribed by the Secretary) a student regularly attending a school, college, or university, or regularly attending a course of vocational or technical training designed to fit him for gainful employment;

(b) The term "aid to families with dependent children" means money payments with respect to, or (if provided in or after the third month before the month in which the recipient makes application for aid) medical care in behalf of or any type of remedial care recognized under State law in behalf of, a dependent child or dependent children, and includes (1) money payments or medical care or any type of remedial care recognized under State law to meet the needs of the relative with whom any dependent child is living (and the spouse of such relative if living with him and if such relative is the child's parents and the child is a dependent child by reason of the physical or mental incapacity of a parent or is a dependent child under section 607 of this title), and (2) payments with respect to any dependent child (including payments to meet the needs of the relative, and the relative's spouse, with whom such child is living, and the needs of any other individual living in the same home if such needs are taken into account in making the determination under section 602 (a)(7) of this title) which do not meet the preceding requirements of this subsection, but which would meet such requirements except that such payments are made to another individual who (as determined in accordance with standards prescribed by the Secretary) is interested in or concerned with the welfare of such child or relative, or are made on behalf of such child or relative directly to a person furnishing food, living accommodations, or other goods, services, or items to or for such child, relative, or other individual, but only with respect to a State whose State plan approved under section 602 of this title includes provision for—

(A) determination by the State agency that the relative of the child with respect to whom such payments are made has such inability to manage funds that making payments to him would be contrary to the welfare of the child, and, therefore, it is necessary to provide such aid with respect to such child and relative through payments described in this clause (2);

(B) undertaking and continuing special efforts to develop greater ability on the part of the relative to manage funds in such manner as to protect the welfare of the family;

(C) periodic review by such State agency of the determination under clause (A) to ascertain whether conditions justifying such determination still exist, with provision for termination of such payments if they do not and for seeking judicial appointment of a guardian or other legal representative, as described in section 1311 of this title, if and when it appears that the need for such payments is continuing, or is likely to continue, beyond a period specified by the Secretary;

(D) aid in the form of foster home care in behalf of children described in section 608(a) of this title; and

(E) opportunity for a fair hearing before the State agency on the determination referred to in clause (A) for any individual with respect to whom it is made;

(d) The term "family services" means services to a family or any member thereof for the purpose of preserving, rehabilitating, reuniting, or strengthening the family, and such other services as will assist members of a family to attain or retain capability for the maximum self-support and personal independence.

(e) (1) The term "emergency assistance to needy families with children" means any of the following, furnished for a period not in excess of 30 days in any 12-month period, in the case of a needy child under the age of 21 who is (or, within such period as may be specified by the Secretary, has been) living with any of the relatives specified in subsection (a) (1) of this section in a place of residence maintained by one or more of such relatives as his or their own home, but only where such child is without available resources, the payments, care, or services involved are necessary to avoid destitution of such child or to provide living arrangements in a home for such child, and such destitution or need for living arrangements did not arise because such child or relative refused without good cause to accept employment or training for employment—

(A) money payments, payments in kind, or such other payments as the State agency may specify with respect to, or medical care or any other type of remedial care recognized under State law on behalf of, such child or any other member of the household in which he is living, and

(B) such services as may be specified by the Secretary;

but only with respect to a State whose State plan approved under section 602 of this title includes provision for such assistance.

(2) Emergency assistance as authorized under paragraph (1) may be provided under the conditions specified in such paragraph to migrant workers with families in the State or in such part or parts thereof as the State shall designate. (As amended July 30, 1965, Pub. L. 89-97, title IV, § 409, 79 Stat. 422; Jan. 2, 1968, Pub L. 90-248, title II, §§ 201(f), 206(b), 207(a), 241(b)(5), 81 Stat. 880, 893, 916.)

§ 607. Dependent children of unemployed parents; termination date; definition.

(a) The term "dependent child" shall, notwithstanding section 606(a) of this title, include a needy child who meets the requirements of section 606(a)(2) of this title who has been deprived of parental support or care by reason of the unemployment (as determined in accordance with standards prescribed by the Secretary) of his father, and who is living with any of the relatives specified in section 606(a)(1) of this title in a place of residence maintained by one or more of such relatives as his (or their) own home.

(b) The provisions of subsection (a) of this section shall be applicable to a State if the State's plan approved under section 602 of this title.

(1) requires the payment of aid to families with dependent children with respect to a dependent child as defined in subsection (a) of this section when—

(A) such child's father has not been employed (as determined in accordance with standards prescribed by the Secretary) for at least 30 days prior to the receipt of such aid,

(B) such father has not without good cause, within such period (of not less than 30 days) as may be prescribed by the Secretary, refused a bona fide offer of employment or training for employment, and

(C) (i) such father has 6 or more quarters of work (as defined in subsection (d)(1) of this section) in any 13-calendar-quarter period ending within one year prior to the application for such aid or (ii) he received unemployment compensation under an unemployment compensation law of a State or of the United States, or he was qualified (within the meaning of sub-

§ 1316. Administrative and judicial review of public assistance determinations.

(a) (1) Whenever a State plan is submitted to the Secretary by a State for approval under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, he shall, not later than 90 days after the date the plan is submitted to him, make a determination as to whether it conforms to the requirements for approval under such subchapter. The 90-day period provided herein may be extended by written agreement of the Secretary and the affected State.

(2) Any State dissatisfied with a determination of the Secretary under paragraph (1) of this subsection with respect to any plan may, within 60 days after it has been notified of such determination, file a petition with the Secretary for reconsideration of the issue of whether such plan conforms to the requirements for approval under such subchapter. Within 30 days after receipt of such a petition, the Secretary shall notify the State of the time and place at which a hearing will be held for the purpose of reconsidering such issue. Such hearing shall be held

not less than 20 days nor more than 60 days after the date notice of such hearing is furnished to such State, unless the Secretary and such State agree in writing to holding the hearing at another time. The Secretary shall affirm, modify, or reverse his original determination within 60 days of the conclusion of the hearing.

(3) Any State which is dissatisfied with a final determination made by the Secretary on such a reconsideration or a final determination of the Secretary under sections 304, 604, 1204, 1354, 1384, or 1396c of this title may, within 60 days after it has been notified of such determination, file with the United States court of appeals for the circuit in which such State is located a petition for review of such determination. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary. The Secretary thereupon shall file in the court the record of the proceedings on which he based his determination as provided in section 2112 of Title 28.

(4) The findings of fact by the Secretary, if supported by substantial evidence, shall be conclusive; but the court, for good cause shown, may remand the case to the Secretary to take further evidence, and the Secretary may thereupon make new or modified findings of fact and may modify his previous action, and shall certify to the court the transcript and record of the further proceedings. Such new or modified findings of fact shall likewise be conclusive if supported by substantial evidence.

(5) The court shall have jurisdiction to affirm the action of the Secretary or to set it aside, in whole or in part. The judgment of the court shall be subject to review by the Supreme Court of the United States upon certiorari or certification as provided in section 1254 of Title 28.

(b) For the purposes of subsection (a) of this section, any amendment of a State plan approved under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, may, at the option of the State, be treated as the submission of a new State plan.

(c) Action pursuant to an initial determination of the Secretary described in subsection (a) of this section shall not be stayed pending reconsideration, but in the event that the Secretary subsequently determines that his initial determination was incorrect he shall certify restitution forthwith in a lump sum of any funds incorrectly withheld or otherwise denied.

(d) Whenever the Secretary determines that any item or class of items on account of which Federal financial participation is claimed under subchapter I, X, XIV, XVI, or XIX of this chapter, or part A of subchapter IV of this chapter, shall be disallowed for such participation, the State shall be entitled to and upon request shall receive a reconsideration of the disallowance. (Aug. 14, 1935, ch. 531, title XI, § 1116, as added July 30, 1965, Pub. L. 89-97, title IV, § 404(a), 79 Stat. 419, and amended Jan. 2, 1968, Pub. L. 90-248, title II, § 241(c)(5), 81 Stat. 917.)

The Administrative Procedure Act, 5 U.S.C. (Supp. IV), pertinently provides:

§ 551. Definitions.

For the purpose of this subchapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title—

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate of financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a

matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

(8) "license" includes the whole or a part of an agency permit, certificate, approval, registration, charter, membership, statutory exemption or other form of permission;

(9) "licensing" includes agency process respecting the grant, renewal, denial, revocation, suspension, annulment, withdrawal, limitation, amendment, modification, or conditioning of a license;

(10) "sanction" includes the whole or a part of an agency—

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency—

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section; and

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act.

(Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 381.)

§ 553. Rule making.

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms of substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the ruling making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 383.)

§ 554. Adjudications.

(a) This section applies, according to the provisions thereof, in every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, except to the extent that there is involved—

(1) a matter subject to a subsequent trial of the law and the facts de novo in a court;

(2) the selection or tenure of an employee, except a hearing examiner appointed under section 3105 of this title;

(3) proceedings in which decisions rest solely on inspections, tests, or elections;

(4) the conduct of military or foreign affairs functions;

(5) cases in which an agency is acting as an agent for a court; or

(6) the certification of worker representatives.

(b) Persons entitled to notice of an agency hearing shall be timely informed of—

(1) the time, place, and nature of the hearings.

(2) the legal authority and jurisdiction under which the hearing is to be held; and

(3) the matters of fact and law asserted.

When private persons are the moving parties, other parties to the proceeding shall give prompt notice of issues controverted in fact or law; and in other instances agencies may by rule require responsive pleading. In fixing the time and place for hearings, due regard shall be had for the convenience and necessity of the parties or their representatives.

(c) The agency shall give all interested parties opportunity for—

(1) the submission and consideration of facts, arguments, offers of settlement, or proposals of adjustment when time, the nature of the proceeding, and the public interest permit; and

(2) to the extent that the parties are unable so to determine a controversy by consent, hearing and decision on notice and in accordance with sections 556 and 557 of this title.

(d) The employee who presides at the reception of evidence pursuant to section 556 of this title shall make the recommended decision or initial decision required by section 557 of this title, unless he becomes unavailable to the agency. Except to the extent required for the disposition of ex parte matters as authorized by law, such an employee may not—

(1) consult a person or party on a fact in issue, unless on notice and opportunity for all parties to participate; or

(2) be responsible to or subject to the supervision or direction of an employee or agent engaged in the performance of investigative or prosecuting functions for an agency

An employee or agent engaged in the performance of investigative or prosecuting functions for an agency in a case may not, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 557 of this title, except as witness or counsel in public proceedings. This subsection does not apply—

(A) in determining applications for initial licenses;

(B) to proceedings involving the validity or application of rates, facilities, or practices of public utilities or carriers; or

(C) to the agency or a member or members of the body comprising the agency.

(e) The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 384.)

§ 555. Ancillary matters.

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter.

(b) A person compelled to appear in person before an agency or representative thereof is entitled to be accompanied, represented, and advised by counsel or, if permitted by the agency, by other qualified representative. A party is entitled to appear in person or by or with counsel or other duly qualified representative in an agency proceeding. So far as the orderly conduct of public business permits, an interested person may appear before an agency or its responsible employees for the presentation, adjustment, or determination of an issue, request, or controversy in a proceeding, whether interlocutory, summary, or otherwise, or in connection with an agency function. With due regard for the convenience and necessity of the parties or their representatives and within a reasonable time, each agency shall proceed to conclude a matter presented to it. This subsection does not grant or deny a person who is not a lawyer the right to appear for or represent others before an agency or in an agency proceeding.

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

(e) Prompt notice shall be given of the denial in whole or in part of a written application, petition, or other request of an interested person made in connection with any agency proceedings. Except in affirming a prior denial or when the denial is self-explanatory, the notice shall be accompanied by a brief statement of the grounds for denial. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 385.)

§ 556. Hearings; presiding employees; powers and duties; burden of proof; evidence; record as basis of decision.

(a) This section applies, according to the provisions thereof, to hearings required by section 553 or 554 of this title to be conducted in accordance with this section.

(b) There shall preside at the taking of evidence—

(1) the agency;

(2) one or more members of the body which comprises the agency; or

(3) one or more hearing examiners appointed under section 3105 of this title.

This subchapter does not supersede the conduct of specified classes of proceedings, in whole or in part, by or before boards or other employees specially provided for by or designated under statute. The functions of presiding employees and of employees participating in decisions in accordance with section 557 of this title shall be conducted in an impartial manner. A presiding or participating employee may at any time disqualify himself. On the filing in good faith of a timely and sufficient affidavit of personal bias or other disqualification of a presiding or participating employee, the agency shall determine the matter as a part of the record and decision in the case.

(c) Subject to published rules of the agency and within its powers, employees presiding at hearings may—

(1) administer oaths and affirmations;

(2) issue subpenas authorized by law;

(3) rule on offers of proof and receive relevant evidence;

(4) take depositions or have depositions taken when the ends of justice would be served;

(5) regulate the course of the hearing;

(6) hold conferences for the settlement or simplification of the issues by consent of the parties;

(7) dispose of procedural requests or similar matters;

(8) make or recommend decisions in accordance with section 557 of this title; and

(9) take other action authorized by agency rule consistent with this subchapter.

(d) Except as otherwise provided by statute, the proponent of a rule or order has the burden of proof. Any oral or documentary evidence may be received, but the agency as a matter of policy shall provide for the exclusion of irrelevant, immaterial, or unduly repetitious evidence. A sanction may not be imposed or rule or order issued except on consideration of the whole record or those parts thereof cited by a party and supported by and in accordance with the reliable, probative, and substantial evidence. A party is entitled to present his case or defense by oral or documentary evidence, to submit rebuttal evidence, and to conduct such cross-examination as may be required for a full and true disclosure of the facts. In rule making or determining claims for money or benefits or applications for initial licenses an agency may, when a party will not be prejudiced thereby, adopt procedures for the submission of all or part of the evidence in written form.

(e) The transcript of testimony and exhibits, together with all papers and requests filed in the proceeding, constitutes the exclusive record for decision in accordance with section 557 of this title and, on payment of lawfully prescribed costs, shall be made available to the parties. When an agency decision rests on official notice of a material fact not appearing in the evidence in the record, a party is entitled, on timely request, to an opportunity to show the contrary. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 386.)

§ 557. Initial decisions; conclusiveness; review by agency; submissions by parties; contents of decisions; record.

(a) This section applies, according to the provisions thereof, when a hearing is required to be conducted in accordance with section 556 of this title.

(b) When the agency did not preside at the reception of the evidence, the presiding employee or, in cases not subject to section 554(d) of this title, an employee qualified to preside at hearings pursuant to section 556 of this title, shall initially decide the case unless the agency requires, either in specific cases or by general rule, the entire record to be certified to it for decision. When the presiding employee makes an initial decision, that decision then becomes the decision of the agency without further proceedings unless there is an appeal to, or review on motion of, the agency within time provided by rule. On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision except as it may limit the issues on notice or by rule. When the agency makes the decision without having presided at the reception of the evidence, the presiding employee or an employee qualified to preside at hearings pursuant to section 556 of this title shall first recommend a decision, except that in rule making or determining applications for initial licenses—

(1) instead thereof the agency may issue a tentative decision or one of its responsible employees may recommend a decision; or

(2) this procedure may be omitted in a case in which the agency finds on the record that due and timely execution of its functions imperatively and unavoidably so requires.

(c) Before a recommended, initial, or tentative decision, or a decision on agency review of the decision of subordinate employees, the parties are entitled to a reasonable opportunity to submit for the consideration of the employees participating in the decisions—

(1) proposed findings and conclusions; or

(2) exceptions to the decisions or recommended decisions of subordinate employees or to tentative agency decisions; and

(3) supporting reasons for the exceptions or proposed findings or conclusions.

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; and

(B) the appropriate rule, order, sanction, relief, or denial thereof.

(Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 387.)

§ 558. Imposition of sanctions; determination of applications for licenses; suspension, revocation, and expiration of licenses.

(a) This section applies, according to the provisions thereof, to the exercise of a power or authority.

(b) A sanction may not be imposed or a substantive rule or order issued except within jurisdiction delegated to the agency and as authorized by law.

(c) When application is made for a license required by law, the agency, with due regard for the rights and privileges of all the interested parties or adversely affected persons and within a reasonable time, shall set and complete proceedings required to be conducted in accordance with sections 556 and 557 of this title or other proceedings required by law and shall make its decision. Except in cases of willfulness or those in which public health, interest, or safety requires otherwise, the withdrawal, suspension, revocation, or annulment of a license is lawful only if, before the institution of agency proceedings therefor, the licensee has been given—

(1) notice by the agency in writing of the facts or conduct which may warrant the action; and

(2) opportunity to demonstrate or achieve compliance with all lawful requirements.

When the licensee has made timely and sufficient application for a renewal or a new license in accordance with agency rules, a license with reference to an activity of a continuing nature does not expire

§ 559. Effect on other laws; effect of subsequent statute.

This subchapter, chapter 7, and sections 1305, 3105, 3344, 4301(2)(E), 5362, and 7521, and the provisions of section 5335(a)(B) of this title that relate to hearing examiners, do not limit or repeal additional requirements imposed by statute or otherwise recognized by law. Except as otherwise required by law, requirements or privileges relating to evidence or procedure apply equally to agencies and persons. Each agency is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise. Subsequent statute may not be held to supersede or modify this subchapter, chapter 7, sections 1305, 3105, 3344, 4301(2)(E), 5362, or 7521, or the provisions of section 5335(a)(B) of this title that relate to hearing examiners, except to the extent that it does so expressly. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 388.)

Chapter 7.—JUDICIAL REVIEW

§ 701. Application; definitions.

(a) This chapter applies, according to the provisions thereof, except to the extent that—

(1) statutes preclude judicial review; or

(2) agency action is committed to agency discretion by law.

(b) For the purpose of this chapter—

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include—

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41; or sections 1622, 1884, 1891–1902, and former section 1641(b)(2), of title 50, appendix; and

(2) "person", "rule", "order", "license", "sanction", "relief", and "agency action" have the meanings given them by section 551 of this title. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

§ 702. Right of review.

A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

§ 703. Form and venue of proceeding.

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. (Pub. L. 89–554, Sept. 6, 1966, 80 Stat. 392.)

§ 704. Actions reviewable.

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsiderations, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 392.)

§ 705. Relief pending review.

When an agency finds that justice so requires, it may postpone the effective date of action taken by it, pending judicial review. On such conditions as may be required and to the extent necessary to prevent irreparable injury, the reviewing court, including the court to which a case may be taken on appeal from or on application for certiorari or other

§ 706. Scope of review.

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error. (Pub. L. 89-554, Sept. 6, 1966, 80 Stat. 393.)

ERRATA

Page 16, lines 5-6, read:

> exhibits, but called no witnesses. The court made no findings of fact or conclusions of law. It did, however, make a statement

Those lines should read:

> exhibits, but called no witnesses. The court made oral findings of fact and conclusions of law (J. A. 105-108), and it made a statement

Nos. 23,787 and 23,890

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

THE NATIONAL WELFARE RIGHTS
ORGANIZATION, et al.,

Appellants

v.

THE HONORABLE ROBERT FINCH, Secretary,
United States Department of Health,
Education and Welfare, et al.,

Appellees.

APPELLANTS' RESPONSE BRIEF

Carl Rachlin
James Spitzer, Jr.
140 West 62nd Street
New York, New York

Florence Roisman
416 Fifth Street, N.W.
Washington, D.C.

Edward V. Sparer
University of Pennsylvania Law
School
Philadelphia, Pennsylvania

Roger L. Rice
National Welfare Rights Organizatio
1419 H Street, N.W.
Washington, D.C.

Of Counsel: Stephen Wexler
National Welfare
Rights Organization
1419 H Street, N.W.
Washington, D.C.

INDEX

CITATIONS

Cases:

Statutes:

There are two related questions at issue in this consolidated appeal:

(1) Do appellants have a right to participate in the proceedings which culminate in decisions about state conformity with the Social Security Act?

(2) If such a right exists, what kind of participation are appellants entitled to?

APPELLANTS HAVE A RIGHT TO PARTICIPATE IN CONFORMITY HEARINGS CALLED UNDER 42 USC 604 (a)

Appellees argue that appellants have no <u>right</u> to participate in any way. The Secretary is said to have complete discretion to deny appellants any participation, including the <u>amicus</u> status originally offered.(Appellees' Brief, pp 34-39) However, the agency is eager to make the best possible decision, taking into account all the available and relevant information on conformity. It, therefore, originally offered to receive from appellants as <u>amicus</u> a short oral statement and a written brief. (Joint Appendix pp 49, 50, 52) and, in its brief, has enlarged this offer to include the receipt of evidence from appellants as <u>amicus</u> based on examination or cross-examination, if it can be shown to the examiner that such procedure "could contribute to the making of a sound decision". (Appellees' Brief, p 20)

But appellants have a right to participate which is independent of any ad hoc offer by the agency. This right, which is independent of, but in no way inconsistent with, the agency's concern about proper performance of its task, has three legal bases:

(a) The Social Security Act

(b) The Administrative Procedure Act

(c) The Fifth Amendment

I. THE SOCIAL SECURITY ACT

Section 404(a) of the Social Security Act requires that before the Secretary decides that a state is not in conformity with the Act, a hearing must be afforded to the state agency. 42 USC 602 (a) Appellees contend that this provision confers an exclusive right on the state alone to participate in the conformity hearing. We disagree; on the contrary, in our view, the language of Section 404(a) merely assures the State of an opportunity to participate in a hearing at which the more directly affected welfare recipients have an obvious right to participate.

The State because essentially it is a conduit through which Federal funds are conveyed to the appellants, has only a remote and indirect interest in the decision regarding conformity, no right to judicial review of the Secretary's decision , and only has a right to participate in the hearing because of the specific statutory grant of Section 404 (a). Additional support for this proposition may be found in Section 1116 of the Act (42 USC 1316) which gives the States the right to judicial review of decisions made under Section 404 (a). Unless this provision of Section 1116 is completely meaningless, it grants a right to judicial review which does not otherwise exist. Appellees correctly perceive this to be the purpose of Section 1116. (Appellees' Brief, p 38)

While Congress took pains to include the State in a hearing

from which it otherwise would be excluded, it did not specify all the other parties to that hearing. Rather, Congress relied on the common-sense notion that the only really interested persons - the recipients of the aid authorized in the Act, and the beneficiaries of the conditions placed on Federal funding in 42 USC 602(a) - would have standing to seek enforcement of those conditions in court and, a fortiori, standing to participate in the administrative hearings on that issue.

Even if one were to assume that Congress did not specifically turn its attention to the question of what parties would participate in hearings under Section 404(a), this Court must address that question. Congress did not intend to, nor did it exclude from this hearing, those parties who would have standing to seek judicial review of any decision coming from thehearing. Whether in 1935 Congress was aware of the existence of appellants ability, interest or common law right to seek judicial review of conformity decisions, this court must read the hearing provision in the Act in terms of 35 years of political and judicial history: appellants are prepared to represent and are capable of representing their interests in this hearing, something which may not have been true in 1935; finally, while the question of whether recipients were entitled to judicial review of agency enforcement of the Act may have been open in 1935, this Court made clear in Curran v. Clifford, 37 LW 2390 (D.C. Cir., December 27,. 1968), that the beneficiaries of a statute had standing to seek judicial review of its enforcement especially where, as here, no one else was likely to complain about failure of enforcement and the statute embodied vital national policy. In Peoples v. USDA, No. 22,574 (February 3, 1970, D.C. Cir.), this court held that poor people had standing to seek judicial

review of agency implementation of a statute for their benefit. Surely, if poor people have standing to seek judicial review of such agency action, the Court is construing the hearing section of the Social Security Act ought declare their right to participate in the initial agency proceeding itself.

Appellees cite the "agency's long-standing interpretation" of the Act in support of their contention that the State has an exclusive right to appear with HEW as a party to the hearing. (Appellees' Brief, p 32) There is, however, no such long-standing interpretation. Welfare recipients made no request for such status prior to the 1968 Georgia hearing. The Administrator's decision (Joint Appendix p 52) to deny appellants status as a party in the hearings at issue beforethe court, is only the second time such an interpretation of the Act has been rendered regarding welfare recipients in the state affected by the hearing.

II. THE ADMINISTRATIVE PROCEDURE ACT

Appellees in their brief content that appellants have no right to appear as parties in these hearings nor even a right to judicial review of agency decisions resulting from the hearings. (Appellees' Brief, pp 34-39) This position is untenable in light of Curran v. Clifford, supra; Curran v. Laird, 38 LW 2319 (D.C. Cir., November 12, 1969) No. 21040 and Peooles v. USDA, supra. This court has read Curran v. Laird to declare "a presumptive standing, operative unless negatived by a statutory provision, which permits a complaint, alleging that executive programs unlawfully deviate from statutory requirements, to be filed by those who were intended beneficiaries of the statutory provisions, even though they are not

the primary beneficiaries of the statute." Peoples v. USDA, supra. Indeed, Peoples itself holds that "the principles of standing... establish the standing of poor people to complain of illegal departures by the Secretary from the Congressional plan, since they are the intended beneficiaries of Congress...." In neither Curran nor Peoples could the court find that those seeking standing were the sole beneficiaries of the statute at issue, nevertheless the court held for standing. Here, where appellants are the only intended beneficiaries of the Act, they obviously have standing to seek judicial review of agency proceedings involving compliance with the Act's conditions. If appellants do have standing to seek judicial review, they are entitled by the Administrative Procedure Act and by any reasonable review of the judicial and administrative process to participate in the hearing itself.

Appellees' contention that 5 USC 554(c) and 551(3) confer status only in conjunction with a "persons aggrieved" statute is mistaken. The question of whether a person "is of right to be admitted as a party" (5 USC 551(3)) does not, as appellees contend, turn on the existence of a "persons aggrieved" statute; the proper test is whether the person would be entitled to judicial review. In our view if a person is entitled to judicial review, he is entitled under the Administrative Procedure Act to participate in the agency proceeding. Appellees recognize as much when they properly interpret Office of Communication of United Church of Christ v. FCC, 359 F.2d 944, 123 U.S. App. D.C. 328 (1966) and American Communications Association v. U.S., 298 F.2d 648 (2d Cir., 1962) to have determined that persons able to obtain judicial review "were entitled to intervene in the agency to make the right to judicial review effective." (Appellees' Brief, p 36)

Appellants, however, need not rely solely on common law right to judicial review. It is clear that, through an improper determination of state conformity with the Act, appellants may suffer the "legal wrong" required by 5 USC 702. Appellees contend that only where there is a "person aggrieved" statute can there be a "legal wrong". They say: Plaintiffs arenot covered by a "persons aggrieved" statute, and therefore have suffered no "legal wrong". (Appellees' Brief, p 38, emphasis added) But Curran and Peoples establish that a "legal wrong" is the infringement of a benefit conferred by a statute, and that there is judicial review to remedy such a "legal wrong". "...The intention to benefit is all that is required to establish a legal right." Curran v. Clifford, supra. In Curran v. Laird, supra, this court, after reviewing the Supreme Court holdings prior to the enactment of the Administrative Procedure Act, said that the impact of those cases had "been reinforced by the enactment of the Administrative Procedure Act...." In sum, appellants come within the Administrative Procedure Act's standards both for judicial review and for status to participate in the agency hearing.

Against these three bases for appellants' right of participation, the appellees raise a number of imagined disadvantages to the agency which might flow from such participation. Even if one were to acknowledge - which we do not - that participation in these proceedings might disadvantage the agency, appellants' right to participate would not disappear. Thus, in U.S. v. O'Brien, 391 US 367 (1967) the Supreme Court held that not all conduct by which a person intends "to express an idea" is speech and in Adderly v. Florida, 385 US 9 (1966) the court held that acts traditionally

classed as speech were not protected in all circumstances. But these limitations on the manner of expression and the circumstances in which the free speech right arises, did not erase that right. Similarly here, a need to balance appellants' rights with the agency's needs do not erase appellants' rights. No decision that those rights can be relied on in all circumstances is necessary to establish that the rights to participation exist in the circumstances involved here. Appellees seem to feel that their conditional offer of certain procedures - examination and cross-examination of witness - ought to satisfy appellants and this court. But, even if these procedures were all that appellants had asked for, the appellees' conditional offer would not meet appellants' claim. Appellees' offer would still give the agency full authority to decide whether to allow even this limited participation in any particular case.

III. THE FIFTH AMENDMENT

Even if the court does not read the Social Security Act to contain a right for recipients to participate in this hearing, the Due Process and Equal Protection Clauses of the 5th Amendment to the U.S. Constitution require the right to participation.

Appellees claim that since the appellants had no "constitutional right to insist upon the enactment of the new statutory conditions respecting the AFDC program", therefore, appellants "have no legal interest of Constitutional proportions in the observance of those conditions." (Appellees' Brief, p 34) This statement by appellees reflects a severe and very dangerous mis-

understanding of the role and scope of the Constitution. It is horn-book law that even though the Constitution does not give welfare recipients a right to a Work Incentive Program (WIN), red-headed welfare recipients could rely on the Equal Protection Clause to assure that HEW may not accept a State Work Incentive Plan which denied such persons admission to WIN solely because of their red hair. The Social Security Act gives welfare recipients certain legal rights. King v. Smith, 392 U.S. 309 (1968); Curran v. Clifford, supra. Due process requires that welfare recipients have a fair opportunity to protect the rights conferred by the Act in any proceeding in which those rights may be adversely affected. Morgan v. U.S., 304 U.S. 1 (1937); Greene v. McElroy, 360 U.S. 474 (1958).

The hearings reflect appellees' own belief that the State is not acting in accordance with those requirements of the Social Security Act specifically designed to benefit appellants. In these hearings, therefore, the State must represent the interests of others of its citizens than the appellants. For example, in its refusal to appropriate money to run a Work Incentive Program and an adequate day-care program, a State's essential role is a financial one, that of representing the interests of its taxpayers and the interests of the beneficiaries of other State programs. If Section 404(a) of the Social Security Act is construed to grant the State an exclusive right to participate in these proceedings, then that Section, in so far as it grants representation to one or more classes of State residents and not to another class equally entitled such representation, denies the members of the latter class the equal protection of law secured by the Fifth Amendment to the Constitution.

We believe that the denial of effective participation in an agency hearing which affects the level of welfare payments, qualifications for such payments, and the services available to recipients of welfare runs counter to the basic procedural fairness and equal treatment required by the Fifth Amendment.

THE NATURE OF APPELLANTS' RIGHT TO PARTICIPATE

If the court should decide that appellants have a right to participate in the proceedings by which state conformity with the Act is determined, it must then address the question of how appellants' right must be balanced against the appellees' admitted interest in orderly and expeditious proceedings. Appellees present in their brief a picture of chaos and confusion if appellants are permitted to participate as full-fledged parties. They claim, in apparent misunderstanding of appellants' brief and request to participate, that appellants wish to take over the agency's responsibilities or to so inhibit their performance as to prevent the agency from functioning effectively.* .

In fact, appellants ask for no such procedures. In the period between the calling and the holding of the hearing appellants ask only that they be allowed to present to the hearing examiner such issues as they believe fall within the scope of the hearing as called by the agency. Any decision as to what his "charter" includes or to the propriety of "charter" itself is for the hearing examiner to make, subject, of course, to the standard practices of

---

* See, for instance, the misquote of appellants' brief which occurs at page 29, lines 4,5, and 6 of appellees' brief.

administrative appeal. Appellees argue that appellants wish to "determine the issues to be encompassed at the hearing". (Appellees' Brief, p 29) Appellants make no such claim. They ask only to be permitted to raise, before the hearing examiner, the question of whether certain issues are properly before him. Thus, for instance, in the Nevada hearing, appellants would seek to persuade the hearing examiner that within the agency's call for the hearings (Joint Appendix, pp 17 and 18) is the question of whether the Work Incentive rules preempt the rules for state-run work programs.

Also, in this pre-hearing stage stipulations of fact might be submitted by counsel for other parties . Appellants are entitled to make objections to such stipulations and seek to persuade the hearing examiner to reject them. Appellees contend that the Nevada and Connecticut hearings are ill-suited to any kind of evidentiary participation by appellants because "the questions of conformity will be readily determinable by a comparison of the Federal requirements and the specific provisions of the State plan." (Appellees' Brief, p. 24) But, appellees go on to indicate that "the relevant facts have already been stipulated by the State and Federal officials involved." (Ibid.) Surely, appellants should be permitted to question these stipulations which may foreclose issues of fact which appellants believe are properly before the hearing examiner. It is for the hearing examiner, not for some of the parties before him, to determine what the "relevant facts" are.

At the hearing itself appellants ask only that they be accorded the rights of all other parties, under the same restrictions as apply to other parties. Appellees suggest that appellants would

use the hearings as a "forum for airing generalized grievances about the nature of activities involving public assistance programs." (Appellees' Brief, p 21) Appellants seek no such forum. They do, however, seek to put before the hearing examiner such matters as they may think relevant, subject to his decisions on what is relevant and material within the scope of the agency's charge to him. In sum, they seek no more at the hearing, than what is awarded to the other parties.

Appellees' also complain that any participation by appellants in the process of negotiations "would seriously dilute the ability of the agency to carry out its duties and cripple the effective and orderly administration of public assistance programs". (Appellees' Brief, p 26) Appellants are portrayed as seeking "the power to veto the Secretary's decision on the approval or disapproval of State plan material." (Appellees' Brief, p 28) But here, too, appellants seek no such authority.

In the first instance, appellants disagree with the government's contention that participation by welfare recipients in negotiations with the States on conformity would cripple effective and orderly administration of the public assistance programs. There are many instances in which greater involvement of interested non-agency parties in such negotiations would enhance the chances for a prompt and proper agreement. Winifred Bell, an authority who was cited by the Supreme Court in King v. Smith, supra, at 321, insists that the early inclusion of interested parties in the negotiations with States concerning the "man-in-the-house" rule would have led to a much earlier settlement and would have avoided many of the problems which HEW had because of its policy of secret, closed negotiations. Bell, Aid to Dependent Children (1965), passim.

More to the point, however, appellants do not insist on a right to participate in the actual process of negotiations. However, when, after a hearing has been ordered, negotiations between HEW and the State result in a proposed settlement to resolve an issue which has been called for a hearing, that proposal ought, unless all parties to the hearing agree, be submitted to the hearing examiner. The examiner would then determine, in the first instance, whether the proposed settlement properly resolves the non-conformity issues which he was charged with deciding. Appellants, as parties to the hearing, would have the right to object to the proposed settlement, and to seek to convince the hearing examiner that the settlement did not meet the terms of the issue(s) which the Secretary had charged him with resolving. Appellants thus seek no more than to have the Secretary abide by the grant of authority which he has made to the hearing examiner. Appellees claim that appellants wish to interfere in the Secretary's decision to approve State plans. The Secretary, by calling a hearing, relinquishes the power to make an initial finding of conformity or non-conformity in areas covered by the hearing; that authority belongs to the hearing examiner. The transcript of the Connecticut hearing makes clear that the hearing examiner is independent of the Secretary. Mr. Myron Berman appeared at the hearing "representing the Secretary of the Department of Health, Education and Welfare". (Joint Appendix, p 118) If the Secretary, one party to the hearing, decides that through negotiations he has been able to resolve the issue called for hearing, the proper procedure is to move for the cancellation of the hearing on the grounds that the issue(s) in it

have been resolved. Appellants, as a party, could object. For the Secretary, on whatever ground, to unilaterally terminate the hearing once called, is to seriously compromise the function and independence of the hearing examiner.

Appellants have suggested a mode of procedure which affords them a full and fair opportunity to protect their statutory interests without in any way impeding the administrative process or compromising the statutory authority of the Secretary to administer Federally financed welfare programs. Appellants believe that once a hearing is called, the charter of the hearing can and should be construed by the hearing examiner, relevance and materiality can and should be determined by him, orderly proceedings can and should be run under his direction, and the resolution of relevant and material issues can and should be by him. Thus, appellants do not ask this court to determine any of the procedural issues within the competence of the hearing examiner. In summary, appellants only ask this court to make effective their right to appear as a parties in conformity hearings; to decide that their rights in such hearings are equal to those of other parties; and to decide that such rights include: the right to ask for a determination by the hearing examiner of whether issues they propose are properly parts of the hearing; the right to object to proposed stipulations and agreements; the right to present and cross-examine witnesses within the proper discretion of the hearing examiner as to relevance, materiality and competency; the right to object to, comment upon or propose evidence on the merits of any proposed settlement, and the right to any similar procedures available to other parties

and necessary to protect appellants' interest.

Appellants agree with appellees' contention that "this case does not involve the questions whether, and in what circumstances, the Secretary must call a conformity hearing, or whether and in what circumstances, the Secretary must terminate Federal grant-in-aid to particular states." (Appellees' Brief, p 18) We disagree, however, with appellees' suggestion that appellants'"claim appears to encompass participation in more than merely the conformity hearing itself." (Appellees' Brief, p 18) Appellees feel that "implicit in their [appellants'] argument is the contention that they [appellants] are entitled to: decide what issues will be raised at the hearing and the scope of those issues; participate as of right in the Secretary's decision to approve or disapprove a State plan; and participate as of right in the negotiations between the Secretary and the State involved". (Appellees' Brief, pp 18-19) Appellants have stated that they seek to decide nothing, but rather to assert their rights, in so far as the hearing is concerned, to make representations to the hearing examiner on the issues to be considered at the hearing, and about any proposed settlement of those issues whether that settlement regards new plan material or not. Appellants make no claims to this court as to participation in any administrative process before a hearing is called. The court need not deal with any question as to the existence or nature of appellants' rights in any context other than during the pendency of a hearing. Thus, the only questions before the Court are: (1) Whether appellants have a right to effective participation in the procedures for determining conformity? (2) Without regard to

other situations, does the right to effective participation arise in the situation where the Secretary has called a hearing? (3) What procedures adequately balance appellants' right, if it exists, against the need for fair and orderly procedures? Any question about appellants' right in the absence of a hearing are outside the issues presented to the court.

RESPONSES TO THREE MISCELLANEOUS POINTS IN APPELLEES' BRIEF

Three additional points in appellees' brief require comment.

1. Appellees state that: "The individuals and groups who have some interest in the outcome of negotiations [and hearings] are numerous and diverse" (Appellees' Brief, p 26) and cite as an example "The Connecticut Hospital Association [which] asked to participate as amicus curiae because of its interest in the States' (sic) Medical Assistance ("MA") Program. (Appellees' Brief, p 27)

Appellants would note that this court is not called upon to determine all of those who as of right should be parties to the hearings. The court is asked to determine the status only of appellants. Additionally, appellants would note that the "interest" of the Connecticut Hospital Association is far from equivalent to the interest of welfare recipients. The Connecticut Hospital Association is, in so far as the Social Security Act is concerned, an ancillary party, with an interest less significant than than of the State welfare agency. It provides, under Congressional direction and at public expense, a service to the only parties with any real interest in the terms of the Social Security Act. Like the

State, it is interested in the outcome of the conformity hearing. Whether it has any legal interest in such proceeding is highly doubtful.

2. Appellees state that when "the question of the approval of the State plan [is] in a state of suspension...the individuals who would otherwise receive the benefits of the State's program would be denied public assistance payments." (Appellees' Brief, pp 27-28) It has, however, been the consistent policy and practice of HEW not to terminate assistance while the question of the approval of the State's plan was undecided. Any slight delay in the hearing or negotiations necessary to accomodate appellants' procedural rights will not result in the cut-off of funds to states or welfare recipients.

3. Appellees state that "the interests of different members of an organization could be expected to conflict". (Appellees' Brief, p 26) It is difficult to perceive the relevance of this observation in determining appellants' rights. Clearly, it is for NWRO to decide on its position. If there were other organizations of welfare recipients, and if they sought to appear as parties they would also have the right to appear and present their position. In any event, since no other group has come forward, neither the court nor the agency need concern itself with an issue which does not exist.

CONCLUSION

In conclusion, appellants respectfully invite the court's attention to the reports of various commissions which we have previously cited, and which make clear that poor people in the United

States do not feel involved in and do not trust the administrative agencies which have such a large impact on their lives. Appellants in this action seek the right to participate in the processes which directly and specifically affect their very lives. In this connection, Chief Justice Hughes' statement in Morgan v. U.S., 304 U.S. 1,22 (1937) is particularly appropriate here:

> The maintenance of proper standards on the part of the administrative agencies in the performance of their quasi-judicial functions is of the highest importance and in no way cripples or embarasses the exercise of their appropriate authority. On the contrary, it is in their manifest interest... if these multiplying agencies deemed necessary in our complex society are to serve the purposes for which they are created and endowed with vast powers, they must accredit themselves by acting in accordance with the cherished judicial tradition embodying the basic concepts of fair play.
>
> Morgan v. U.S., supra, at 22.

Respectfully submitted,

Roger L. Rice, Esq.
Carl Rachlin, Esq
M. James Spitzer Jr., Esq
Florence Roisman, Esq.
Edward V. Sparer, Esq

Certificate of Service

I certify that I have served a copy of this Response Brief on the Appellees, by personally serving Raymond Battochi, Justice Department, Washington, D.C. on the 20th day of February, 1970.

Roger 1. Rice, Esq.

Nos. 23,787 and 23,890

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

THE NATIONAL WELFARE RIGHTS
ORGANIZATION, et al.,

Appellants,

v.

THE HONORABLE ROBERT FINCH, Secretary,
United States Department of Health,
Education and Welfare, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMEIA

SUPPLEMENTAL BRIEF FOR APPELLEES IN RESPONSE TO BRIEF OF NEW HAVEN LEGAL ASSISTANCE ASSOCIATION, INC.

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ALAN S. ROSENTHAL,
RAYMOND D. BATTOCCHI,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

IN THE UNITED STATES COURT OF APPEALS FOR
THE DISTRICT OF COLUMBIA CIRCUIT

Nos. 23,787 and 23,890

THE NATIONAL WELFARE RIGHTS
ORGANIZATION, et al.,

Appellants,

v.

THE HONORABLE ROBERT FINCH, Secretary,
United States Department of Health,
Education and Welfare, et al.,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

SUPPLEMENTAL BRIEF FOR APPELLEES IN RESPONSE TO BRIEF OF NEW HAVEN LEGAL ASSISTANCE ASSOCIATION, INC.

We are filing this brief in response to a brief filed by the New Haven Legal Assistance Association, Inc. (the "NHLAA") as amicus curiae in support of the appellants.

In its brief, the NHLAA gives examples of testimony which various welfare recipients allegedly would have given were they permitted to testify at the Connecticut conformity hearing. After reciting this testimony, the NHLAA apparently draws two conclusions. The first is that unless these witnesses are permitted to testify, HEW will be compelled to accept the State's version of the facts, with the likely result that after the hearing is concluded, the State will continue to violate federal

law, only now with the stamp of approval of HEW (Brief at 18-20). The second is that unless these witnesses are permitted to testify, various violations of the Social Security Act will go unnoticed by HEW (Brief at 20).

We will show below that neither of these conclusions is sound. Before doing so, however, we wish to emphasize that even if both of these conclusions were entirely correct, plaintiffs still would not be entitled to the relief they seek. Plaintiffs assert that they have a right to participate as parties in certain negotiations and in proposed conformity hearings. But if such a right exists, it must have a basis in law. As we demonstrated in our main brief, plaintiffs have not pointed to a legal foundation upon which such a right could be rested. Neither the Constitution, the Social Security Act, the Administrative Procedure Act, nor the common law gives plaintiffs the right to participate in negotiations or conformity hearings.

1. That the NHLAA is able to draw the first conclusion demonstrates that it misunderstands the nature of the scheduled conformity hearing involving Connecticut. For that hearing was to involve questions as to either 1) the failure of the State to submit any plan material on certain matters, or 2) whether particular provisions of the State plan as written conformed with the Act. The hearing would not have involved the question whether the State plan was being administered in a manner inconsistent with its terms. It necessarily follows that the testimony of welfare recipients as to past State practices would have been outside the scope of the hearing. That this is so can be

illustrated by exploring the manner in which welfare recipients desired to participate in the resolution of two issues, one involving the failure of the State to submit any plan material with respect to certain federal requirements, the other involving whether provisions of the State plan as written conform with the Act.

a. One issue which the Administrator proposed to raise at the hearing was whether, in light of the fact that the State had failed to submit plan material on the subject of service programs for families with children, the State's plan was out of conformity with that provision of the Act requiring such material. (NHLAA brief at 11). As we indicated in our main brief (at p. 24), issues of this type can be resolved quite simply. If there is no such material, the Secretary would be justified in assuming that the State was providing none of the required family services. In view of this, the proposed testimony of individual recipients, offered to demonstrate instances in which the State has not provided family services as required by federal law, would be quite beside the point. Once it is determined that no such material had been submitted, the Secretary could threaten the termination of grants-in-aid. And the State, faced with that possibility, might well decide to submit plan material on the matter of family services. 1/ If the Secretary finds that the new material conforms

---

1/ HEW has informed us that Connecticut has, in fact, submitted plan material on its family services program which the agency is in the process of reviewing.

with the Act, he may approve it. Such an approval would make irrelevant the fact that previous State practices may have conflicted with the Act.

It should be noted, however, that if, after HEW approves certain plan material, welfare recipients bring to HEW's attention instances in which the State is administering its plan in a manner not consistent with the plan's terms, then the Secretary might have occasion to call a separate conformity hearing. The question in that hearing, unlike this one, would go to the State's administration of its plan, and the testimony of individual recipients might be relevant to the Secretary's inquiry. That, however, was not the type of hearing involved here.

b. Another issue which the Administrator specified would be raised at the hearing was whether Connecticut's existing plan provisions denying AFDC benefits to certain children were inconsistent with the Act. The testimony which individual recipients planned to offer on this issue (see NHLAA brief at 21) would have been unnecessary. There is no need for witnesses to demonstrate that the State is administering the plan as it is written. The question is an essentially legal one, viz., whether the plan as written is valid. Any views welfare recipients may choose to express on that question may be presented fully in an amicus brief.

Moreover, it should be noted that individual welfare recipients may challenge in a judicial forum the validity of a State plan provision. See, e.g., King v. Smith, 392 U.S. 309 (1968). What is more, a judicial proceeding challenging the

legality of existing State plan provisions may be instituted at any time--before, during, or after a conformity hearing has been called. And in court plaintiffs could challenge a State plan provision on any legitimate basis--including that the provision is unconstitutional--and they could assert particularized complaints about their treatment at the hands of State officials. 2/ However, a conformity hearing clearly was not intended for such purposes.

In light of this, there is no basis for the NHLAA's assertion that "HEW will be compelled to accept Connecticut's representations as to the facts" (Brief at 18) or that "Connecticut will continue to violate federal law, only now with the unknowing stamp of approval from HEW." (Brief at 20). The only thing the Secretary will accept from the State is new plan material--not representations as to past practices. And, it should go without saying that by approving State plan material, the Secretary is not in any way giving the State a license to administer its plan in the future in a manner inconsistent with the plan's terms.

2/ The fact that recipients may assert in court claims as to the legality of State plan provisions does not mean, of course, that they can seek direct review in a court of appeals of the outcome of a conformity hearing. As we demonstrated in our main brief (at pp. 37-39; see pp. 27-28) only the Secretary and the State can seek such direct review; any other result would permit persons to suspend the approval or disapproval of State plan material until the conclusion of review proceedings. By contrast, any person with a legally protected interest may assert that interest in district court (or state court). That suit, unlike direct review of the outcome of a conformity hearing, would not have the possible effect of arresting the approval or disapproval of State plan material.

2. Nor is there merit to the NHLAA's second conclusion--that unless welfare recipients are permitted to testify, various violations of the Act will go unnoticed by HEW. There are established channels through which alleged instances of a State's failure to conform to the Act can be brought to the attention of HEW. In this connection, officials of HEW meet regularly with representatives of the NWRO to discuss matters of concern to that organization and its members. Furthermore, as far as conformity hearings are concerned, the Administrator permits interested persons to submit their arguments and views in the form of an amicus brief. Welfare recipients are therefore given an ample opportunity to bring to HEW's attention alleged instances of a State's violation of the Act.

CONCLUSION

For these reasons, as well as for the reasons assigned in our main brief, the orders of the district court should be affirmed.

Respectfully submitted,

WILLIAM D. RUCKELSHAUS,
Assistant Attorney General,

THOMAS A. FLANNERY,
United States Attorney,

ALAN S. ROSENTHAL,
RAYMOND D. BATTOCCHI,
Attorneys,
Department of Justice,
Washington, D. C. 20530.

FEBRUARY 1970.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,787
Civil

THE NATIONAL WELFARE RIGHTS ORGANIZATION, et al.,
APPELLANT

VS.

THE HON. ROBERT FINCH, et al.,
APPELLEE

On Appeal from the United States District Court for the

District of Columbia

BRIEF OF AMICUS CURIAE

William H. Clendenen, Jr., Esq.
185 Church Street, Room 805
New Haven, COnnecticut 06510
Tel: (203) 787-5861

Norman K. Janes, Esq.
P.O. Box D
796 Main Street
Willimantic, Connecticut
Tel: (203)423-8425

Attorneys for Amicus Curiae

I N D E X

TABLE OF CITATIONS

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NATIONAL WELFARE RIGHTS ORGANIZATION, et al.,	*	
	*	
APPELLANTS	*	
	*	
VS.	*	Civil No. 23,787
	*	
THE HON. ROBERT FINCH, et al.,	*	
	*	
APPELLEE	*	

Brief of the Quinnipiac Welfare Rights Mothers, Farnum Courts Welfare Rights Mothers, the Willimantic Welfare Rights Mothers and the Togetherness Is Everyone.

The Quinnipiac Welfare Rights Mothers, Farnum Courts Welfare Rights Mothers, the Willimantic Welfare Rights Mothers and Togetherness Is Everyone file this brief pursuant to the written consent of the parties submitted herewith.

Interest of Amicus Curiae

The Quinnipiac Welfare Rights Mothers, Farnum Courts Welfare Rights Mothers, Willimantic Welfare Rights Mothers and Togetherness Is Everyone are voluntary membership associations of welfare recipients in the State of Connecticut. These associations were organized and are controlled and run by the welfare recipients for the protection of the rights of welfare recipients and the advancement of the interests of welfare recipients.

These associations and their members have filed this brief to protect their substantial legal interests and those of the poor that they represent which must inevitably be affected in the hearing scheduled by the defendants against the State of Connecticut for failing to have a welfare program that conforms to the Social Security Act of 1935 as amended. The purpose of this brief is to bring before this court some examples of the testimony that welfare recipients would be able to present at the HEW conformity hearing concerning the Connecticut welfare program. They do not intend the following discussion to be an exclusive listing of the proposed testimony, but rather to demonstrate to the Court the great importance for their being made a party to the hearing.

The issues raised in this HEW hearing cover problems which are confronted daily by welfare recipients who suffer because Connecticut discourages them from working through the misapplication of the incentive earnings provisions of the Social Security Act. See Point II, pp 19-20, infra. It is welfare recipients who suffer because Connecticut has not established day care centers for working mothers receiving welfare. See Point I, G, pp 17-18, infra. It is welfare recipients who suffer because Connecticut makes it virtually impossible for them to obtain homemaker services for their children. See Point I,G,2, p. 18 , infra.

For the above reasons and those that follow, the above mentioned Connecticut welfare rights associations submit this amicus curiae brief.

Jurisdiction

The Amicus Curiae adopt the Appellants' statement

Statement of Issues

The Amicus Curiae adopt the Appellants' statement of the questions presented.

Statement of the Case

The Amicus Curiae adopt the Appellants' statement of the case.

Introduction

A. The Purposes Of the Aid To Dependent Children Program

The purposes of the Aid to Dependent Children Program is to encourage "the care of dependent children in their own homes" and "to furnish financial assistance and rehabilitation and other services...to needy dependent children and the parents or relatives with whom they are living to help maintain and strengthen family life." Title 42 U.S.C. 601. Or as the three-judge court in Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967) stated, "The basic purpose of the program...is to provide financial assistance to needy children who are deprived of the support and care

of one of their parents." See also King v. Smith, 392 U.S. 309, 320, 329-330, 334 (1968); Green v. Department of Public Welfare, 270 F. Supp. 173 (D.Del. 1967); Harrell v. Tobriner, 279 F. Supp. 22,30 (D. D.C.1967); Thompson v. Shapiro, 270 F. Supp. 331 (D. Conn. 1967); Smith v. Reynolds, 277 F. Supp. 65 (E.D. Penn. 1967); State v. Griffiths, 152 Conn. 48, 58, 203 A 2d. 144, 149 (1964).

HEW has specifically defined the purposes of the AFDC program to be as follows:

> Aid to Dependent Children is an essential part of a broad social plan of public services, including education, health, welfare, and the social insurances, that the nation is progressively developing to assure its children opportunity to: (1) grow up in the setting of their own family relationships; (2) have the economic support and services they need for health and development; (3) receive an education that will help them to realize their capacities; and (4) share in the life of the neighborhood and community.
>
> The purpose of Aid to Dependent Children is served in providing opportunity for children to develop individual capacity, with some measure of security against future economic hazards. To enable children receiving aid to dependent children to share in the opportunities in their community for education and for physical and social development requires provision for their special individual requirements as well as for basic maintenance needs within the limits of the resources available. The development of individual capacity is important not only for the individual in achieving a useful and satisfying experience for himself but is significant as well for enriching the life of the community. The

> fundamental purpose of all measures for social security - to foster and preserve basic human resources and family life. Section 3401, Handbook of Public Assistance Administration,

Children in families which receive AFDC payments suffer all the hardships which result from a life of poverty. Living in slum neighborhoods, their health and medical facilities are poorer than those shared by the rest of the city. Their schools lack experienced teachers and adequate facilities. This list of inequitable conditions is long, but the purpose of welfare is not to perpetuate these conditions. Public assistance is meant to relieve the pressure of the fight for food, clothing and shelter, and enable recipients to take advantage of the rehabilitative services so that entire families will not become self-perpetuating members of the welfare system.[1]

Moreover, the past several years have witnessed an increasing recognition by courts of the fundamental importance

---

1 As the Federal Handbook of Public Assistance Administration point out:

> the object of rehabilitative services is to enable the individual to realize his optimum capabilities for stable, personal, social and family functioning, including self-support and self-care; to arrest further loss in functioning and to increase or develop such capacities. (Section 4223.4)

See also President Nixon's special message on Welfare Reform submitted on August 11, 1969. 115 Cong. Rec. No. 7239, 8 U.S. Cong. News, '69, 1233

of welfare benefits in our society. "By hypothesis, a welfare recipient is destitute, without funds or assets." Kelly v. Wyman, 294 F. Supp. 893, 899 (S.D. N.Y. 1968); Green v. Department of Public Welfare, 270 F. Supp. 173, 178 (D. Del. 1967). Because public welfare usually "represents the last resource of those bereft of any alternative," Rothstein v. Wyman, 303 F. Supp. 339, 347 (S.D. N.Y. 1969), courts have held that eligible persons have a right or 'entitlement' to public assistance. Smith v. King, 277 F. Supp. 31, 38 (M.D. Ala. 1967), aff'd sub nom, King v. Smith, 392 U.S. #09 (1968); Shapiro v. Thompson, 394 U.S. 618, 627 n.6; Goliday v. Robinson, ____F. Supp.____, CCH Poverty L. Rep. Section 10,683, pp. 11,547-8 (N.D. Ill. 1969) (three-judge court); cf. Solman v. Shapiro, supra, 300 F. Supp. 409, 416 (D. Conn. 1969), aff'd per curiam, 90 S. Ct. 25 (1969).

Because public welfare may be necessary to meet "the immediate and pressing need for preservation of life and health," Kirk v. Board of Regents, 78 Cal. Rptr. 260, 266 (1969), courts have closely scrutinized decisions which would deprive persons of the means of subsistence. Shapiro v. Thompson, supra; Note, 44 N.Y. U.L. Rev. 989 (1969). In Rothstein v. Wyman, supra, 303 F. Supp. at 346-347, the Court stated:

> Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right. But among our Constitution's expressed purposes was the desire to 'insure domestic Tranquility' and 'promote the general Welfare.' Implicit in those phrases are certain

basic concepts of humanity and decency. One of these, voiced as a goal in recent years by most responsible governmental leaders, both federal and state, is the desire to insure that indigent, unemployable citizens will at least have the bare minimums required for existence, without which our expressed fundamental constitutional rights and liberties frequently cannot be exercised and therefore become meaningless. Legislation with respect to welfare assistance, therefore, like that dealing with public education, access to public parks or playgrounds, or use of the mails, deals with a critical aspect of the personal lives of our citizens, whether such assistance be labelled a 'right,' 'privilege' or benefit. See Sherbert v. Verner, 374 U.S. 398, 404, 83 S. Ct. 1790, 10 L.Ed. 2d 965 (1962). Its importance is magnified by the defenseless and disadvantaged state of the class of citizens to which it relates, who are usually less able than others to enforce their rights. It can hardly be doubted that the subsistence level of our indigent and unemployable aged, blind and disabled involves a more crucial aspect of life and liberty than the right to operate a business of Sunday or to extract gas from subsoil...Poverty is a bitter enough brew. It should not be made even less palatable by the addition of unjustifiable inequalities or discriminations. It must not be forgotten that in most cases public assistance represents the last resource of those bereft of any alternative. Equity (the state or quality of being equal, derived from the Latin aequitas), should least of all be denied the poor. [2]

---

[2] On October 20, 1969, AFDC recipients were granted leave to intervene in Rothstein. The Court issued a preliminary injunction restraining the enforcement of the statute at issue against AFDC recipients. CCH Pov. L. Rep. §10,655

B. Connecticut Is Required To Have Its Program Of Public Assistance Conform To The Social Security Act of 1935.

Under the terms of the Social Security Act, state participation in the AFDC program is voluntary. Connecticut, however, as well as every other state, has chosen to secure the substantial federal funds available under the Social Security Act for distribution to needy children. Connecticut is therefore bound to have its statutes, rules and regulations (known as the "state plan") conform to the requirements of the Social Security Act. King v. Smith, 392 U.S. 309 (1968). See also Solman v. Shapiro, 300 F. Supp. 409 (D. Conn. 1969), aff'd 90 S. Ct. 25 (1969); Doe v. Shapiro, 302 F. Supp. 761 (D. Conn. 1969).

C. HEW Has Challenged Connecticut's Public Assistance Plan On The Basis Of Nonconformity

On November 14, 1969, Miss Mary Switzer, Administrator, Social and Rehabilitation Service, Department of Health, Education and Welfare (HEW) wrote to the former Connecticut Commissioner of Welfare Bernard Shapiro[3] raising five major issues of nonconformity by the State of Connecticut with the Social Security Act of 1935, as amended. (See Exhibit A, attached). Immediately

---

[3] Commissioner Shapiro resigned his post of December 1, 1969. He was replaced by John Harder on an acting basis. On February 9, 19 Mr. Harder became Commissioner.

after learning that issues of Connecticut's noncompliance with federal law had been raised by HEW and that a hearing had been scheduled for January 6, 1970, several Connecticut welfare rights associations sought to appear, through counsel, in the hearing as parties. (See Exhibits B and C, attached).

On December 19, 1969, Miss Switzer wrote to Mr. Harder raising three additional issues of noncompliance by Connecticut with federal law.[4] See Exhibit D. attached. The hearing was rescheduled for January 20, 1970. See Exhibit D.

---

[4] Counsel for amicus curiae did not learn of this letter until after the Connecticut hearing was postponed. See Exhibit E, attached. It is worth noting that Points VI and VIII were raised by counsel for amicus curiae in their request to be made parties. see Exhibits B and C.

I. Connecticut Welfare Recipients Are Extremely Qualified To Describe The Current Quality and Quantity Of Social Services To Families And Children And To Demonstrate That Connecticut Has Not Complied With Title 45 CFR, Ch. IV, Parts 220.

Of great concern to the majority of welfare recipients under the Aid to Dependent Children Program (Title IV, Part A of the Social Security Act, Title 42 U.S.C. Section 601 et seq.) is the failure of the Connecticut State Welfare Department (CSWD) to develop and implement a comprehensive plan of social services for themselves and their children. Welfare recipients in Connecticut must attempt to live and raise their families in the face of the many problems confronting urban America. See Commission Report "The Challenge of Crime in a Free Society, (1967); Report of the National Advisory Commission on Civil Disorders, (1968); Connecticut Welfare Study, (1969); Connecticut State Welfare Department Annual Report to the Governor, 1968-1969. Compounding their problems is the lack of sufficient funds to provide the necessities of life for their children and themselves.[5] As a result, recipients are greatly in need of obtaining social services to assist them in overcoming the many social and economic problems which impair their ability to gain independence from wel-

---

[5] In fact, Former Commissioner of Welfare, Bernard Shapiro in the Connecticut State Welfare Department Annual Report to the Governor, 1968-1969 stated, "Administrators of welfare are aware that assistance standards are not adequate to provide a minimum standard of health and decency, but are limited by lack of funds." p. 2

fare or assure that their children will not be trapped in a cycle of dependency.

Miss Mary E. Switzer, Administrator, Social and Rehabilitation Service, HEW, in her letter of November 21, 1969 to Bernard Shapiro queried:

> V. Aid to Families with Dependent Children - Absence of Plan Material for Service Programs for Families and Children
>
> Whether the state plan under Title IV, Part A of the Social Security Act, in light of the State agency's failure to submit Title IV - A and B plan material for Service Programs for Families and Children by April 30, 1969, is in compliance with Section 402(a) of the Social Security Act and 45 CFR, Part 220. (See Exhibit A)

Connecticut welfare recipients believe that it is vital that they be allowed to introduce direct testimony on the inadequacy of the services provided to families on welfare in Connecticut and to provide testimony on any proposed plan for services to their children. Connecticut welfare recipients testimony would be directed primarily in the following areas:[6]

A. Title 45 CFR, Ch.II, Section 220.3, 34 Fed. Reg. 1054, January 18, 1969 requires that services to families and children be provided to the maximum extent feasible, by personel seperate from the staff that determines eligibility and provides financial assistance. In addition, it requires that there be adequate

---

[6] In the interest of brevity, only some of the major areas of proposed testimony will be listed. Connecticut welfare recipients would cover many other areas and use the following only as examples.

staff, at all levels, to provide these services on a [illegible] time basis.

At the present time in Connecticut, after the initial eligibility is determined, one person, a caseworker, handles the eligibility review, dispenses the financial assistance and provides the services requested by the family.

The Arthur D. Little Co. in its Connecticut Welfare Study (1969) found that a caseworker had an average of 1.75 hours per month to spend on each AFDC family. Ibid. p. 52. In this time, the following tasks had to be performed - travel, case recording, completion of forms, eligibility determination or redetermination, telephone calls, reading and answering correspondence, case reading on new and transferred cases, social services planning, any contacts with other agencies or persons such as clinics, physicians, dentists, visiting nurses, school, etc. as well as any home or office visits with the recipients or other members of the family or collateral contacts in the field or office." Ibid.[7]

Recipients are prepared to testify that it is almost impossible to get caseworkers to visit their homes to discuss such

---

7 Either because of lack of time or the lack of understanding of the recipients' problems, most caseworkers are unable to provide any meaningful social services.

long term and immediate mental problems. Many women who are separated from their husbands during family counselling in order to accomplish a reunifying of the family are the usual wedding removal from AFDC assistance. See 45 CFR 220.22(b). Many mothers desire counselling to assist them in raising their children. See 45 CFR 220.22(c) Problems of truancy from school, drug addiction and premarital sex permeate our entire society, and welfare recipients are not exceptions. See 45 CFR 220.22. Without a father in the home, the burden on the mother is severe. The Connecticut Welfare Study found that the inaccessibility of the caseworker "vastly decreases the possibility of a supportive client-worker relationship, and this type of relationship is needed if the worker is to involve clients in the process of exploring and dealing with their problems. Self-help therefore does not tend to be a product of the client-worker relationship." Ibid, p. 54.

Illustrative of this problem is the situation of Mrs. K. Mrs. K's three school-age children have experienced severe emotional problems in school which have resulted in their expulsion from elementary school. Mrs. K has been attempting for over one year to have her caseworker arrange for a placement of her oldest child in a special school for emotionally disturbed children.

---

o It is very difficult for recipients to get to the CSWD District Office due to the lack of transportation allowance and baby-sitting money. In some areas of the state, it is necessary for recipients to make a long distance call to their District Office. Provision is not made in the welfare budget to pay for these calls.

The problem is not the unavailability of such schools, nor the lack of funds through the welfare department, but rather the caseworker is allegedly not trying to deal with this family. The other two children are also on a year-round school "vacation". See 45 CFR §220.22(a).

Mrs. A's child is ten years old. He was expelled from school two years ago allegedly because he was a behavior problem. He has been classified as mentally retarded by a medical doctor who examined him for about 15 minutes. Mrs. A is still trying to have her caseworker assist her in developing a plan so that her child may obtain special education. Mrs. A's child was referred to juvenile courts over 30 times on various problems in the past year. See 45 CFR §220.22(a).

Connecticut is currently experiencing an in-migration of residents from Puerto Rico. These recipients have an inordinately difficult time in integrating themselves into English-speaking society. The CSWD has few caseworkers who are fluent in Spanish.

The result is almost total absence of communication between CSWD and these families. How can there be a social service plan, if the caseworker cannot even learn of the families' needs or problems? How can these AFDC children receive counseling and

---

9 In Connecticut, "almost seven-tenths of all AFDC mothers [have] more than a high school education. Only about three percent [have] gone beyond high school." Connecticut Welfare Study (Arthur D. Little Co., Inc.), 1969, p.7

assistance directed towards self-sufficiency? To measure this, fine a plan of social services for [illegible] family [illegible] is developed and submitted to DSS, unless [illegible] will be excluded unless adequate provision is made for [illegible] caseworkers. See 45 CFR §220.22.

D. Title 45 CFR §220.4 requires that local offices of the CSWD have advisory committees. An ad hoc advisory committee, composed primarily of welfare recipients, as the New Haven District Office was recently disbanded. The participating recipients were not provided with financial assistance, i.e., transportation and babysitting expenses, to make this participation possible. See 45 CFR §220.4(a)(4).

C. Title 45 CFR §220.5 requires that sufficient numbers of adequately trained personel be available to plan, develop and implement services to families and children. Most of the caseworkers have little or no qualifications to provide social services to families with minor problems, must less major social problems. Very few Masters of Social Work (MSW) are available to deal directly with the recipients. This makes it almost impossible for a mother to obtain help for her child who is mentally or emotionally disturbed or addicted to drugs. There are no provisions for counselling young girls who become pregnant. See 45 CFR

§§220.20 and 220.21.

D. Title 45 CFR § 220.6 requires that employment opportunities and training be made available for recipients to work in the social service program. Many recipients are desirous of such employment, but positions are almost nonexistent. When positions do become available, recipients are hampered by the lack of telephone allowances, misapplication of the incentive earnings formula (See Point I, Exhibit A), irregular transportation allowances and almost nonexistent child care services. See 45 CFR §220.18.

E. Title 45 CFR §220.16 requires that a service plan for each family be developed and implemented. To the recipients' knowledge no such plan has been developed for any family and if plans have been developed, recipients have not been offered the opportunity to accept or reject said plans. 45 CFR §220.16(a). Recipients desire to testify as to what they view as the necessary services to their children. Furthermore, they seek to learn just what services CSWD contends are being currently provided to recipients and what services are planned.

F. Title 45 CFR §220.17 requires that services be provided to help recipients achieve employment and self-sufficiency.

For example, Mrs. M. has one child and is currently enrolled in a two year nursing course. In August 1970 she will be qualified to be a registered nurse. The CAMP has granted her welfare assistance and informed her that she must quit school and either stay at home or get a job. Her child was terminated from welfare assistance last month after an aged relative, with whom the child was living, had a stroke. Because the CAMP disagrees with Mrs. M's choice of training, both must go without subsistence or she must take a low paying job as a nurse's aide.

Mrs. B. has one child and wants to be a medical technologist. The University of Connecticut has extended a scholarship to her. Mrs. B. must either remain at home or take a job if she is to receive welfare assistance for herself and her child.

Other recipients would testify that they are coerced into taking training for which they have no aptitude and in which they are not interested. Others would discuss the many reasons why they stopped working after a period of training because of problems at home that could have been overcome with adequate social services, because of the misapplication of the incentive earnings formula, and because of the unavailability of child care services.

C.1. Title 45 CFR §220.18 requires that child care services be available for all persons referred to or enrolled in the Work Incentive Program. The greatest problem in this area is the

undoubtedly take the form of [illegible] services and future proposals. [illegible] recipients, it is quite possible that [illegible] be found to be technically in conformity with Title 45 C.F.R., Ch. IV, Part [illegible] while it continues to provide, in fact, few if any services to the recipients and their children.

II. The Failure Of [illegible] Barred By Recipients - [illegible]

The failure of OSRD to [illegible] the [illegible] safeguard provisions of Title 42 U.S.C. 602(a)(8) is set out in Point I of Miss Switzer's letter of November 4, 1969 to Bernard Shapiro. See Exhibit A. Besides in this brief, many of the problems which the program of employment of recipients in Connecticut have been detailed. See pp. 6-10, supra. These will not be repeated here, rather some of the less obvious practices of the OSRD will be set forth.

On September 5, 1969, former Commissioner Bernard Shapiro issued a regulation setting forth the policy for back-to-school clothing assistance. See Exhibit F attached. See also Burse v. Shapiro, ____F. Supp.____, (Civ. No. 19,409, D. Conn., Opinion filed December 19, 1969, Blumenfeld, D.J.). Clothing was limited to children who had been employed for the summer, this violated the income disregard provisions of Title 42 U.S.C. 602(a)(8)(A) and

as CWA personnel. Disability [illegible] supervising counselor was employed under the [illegible] program, this relationship was [illegible] to [illegible] U.S.C. [illegible]

Connecticut recipients with [illegible] that they have been denied other necessities because they are under the [illegible] earnings program. This practice has resulted in many recipients leaving employment because they were worse off financially than before they commenced working. See [illegible] Superior Court, [illegible] Day, Judge, [illegible], Dec. [illegible]

These violations of the safeguard of [illegible] provisions of the Social Security Act, which are obvious to recipients, will likely go unnoticed by HEW unless they are made privy to the hearing. The result of this will be that Connecticut will continue to violate federal law, only to [illegible] of approval from HEW.

III. Other Issues of Noncompliance

The letter of November 14, [illegible] of December 19, 1969 to John A. [illegible] (Exhibit D attached) raises [illegible] noncompliance with the Social [illegible] do not directly affect [illegible] others require greater specificity [illegible]

through direct participation in the fair hearing process by

recipients, through the introduction of evidence by way of cross-

examination and cross-examination of witnesses by skilled counsel in

dimensions of the [illegible] in their own testimony.

A. As regards Point II, [illegible] determination of eligibility for aid [illegible] often takes longer than 30 days. [illegible] Assistance Administration §2200(b)(6). See [illegible] Superior Court, Holland County, #12700 (Sept. [illegible] v. Shapiro, Superior Court, Marion County, [illegible] Recipients are prepared to testify as to the [illegible] family whose eligibility is delayed for even a few days. See Kelly v. Wyman, 294 F. Supp. 893 (S.D. N.Y. 1968).

B. As regards Point III, recipients are aware of many adverse situations in which the presence of an unrelated male in the home will cause the [illegible] to serve or all payments in the home. See, e.g., [illegible] (1969), aff'd 90 S. Ct. [illegible] (1969).

C. As regards Point V, recipients are aware of the multi-dimensions of the problem. They do not know, based on the information currently available to them, whether or not Connecticut is in compliance with federal law. They do know that first class

medical care is not available to them.[10] Further, they know that any increased burdens on Connecticut's [illegible] will mean a reduction in the amount available for money payments to their children.

D. As regards Point VI, recipients will seek to demonstrate that there is no rational justification for denying aid to siblings who are separated from each other and live with relatives in different homes. Recipients will prove that the siblings denied aid are just as needy when separated as when they live in one family unit. Recipients will further testify that there are many valid reasons for the splitting of siblings, i.e., [illegible] of parents, illness of supervising relative, [illegible].

E. One of the most troublesome points for recipients is Number VIII. Public Acts 106 and 700 allow the Department of Finance and Control, a state agency separate from CSWD, to have access to the case records of welfare recipients. The information contained in the records is given by recipients with the understanding that it will remain confidential.

By allowing this information to go outside the CSWD, many recipients are no longer willing to discuss any of their personal problems with CSWD caseworkers [illegible] for the family [illegible]

10 A number of doctors and dentists in Connecticut, particularly specialists, refuse to treat welfare recipients.

to [illegible] financial aid and [illegible] services, a great deal of their private lives must be disclosed. Recipients will thereby thus be [illegible] to choose to [illegible] their right to privacy, no information will be [illegible]. Barnes v. Goldberg, 302 F. Supp. 478 (1969); [illegible] 302 F. Supp. 761 (1969), appeal dismissed 38 LW 3279 (1-27-70). Griswold v. Connecticut, 381 U.S. 479 (1965).

Conclusion

The appellants seek to exercise a fundamental right - the right to petition their government for a redress of grievances. First Amendment, United States Constitution. They desire to exercise their right to be heard and to participate in a hearing that will determine issues vital to their rights to live, work and raise their children to be self-sufficient citizens. Fourteenth Amendment, United States Constitution; Rothstein v. Wyman, supra; Smith v. King, supra; Shapiro v. Thompson, supra; Kelly v. Wyman, supra. They are a disadvantaged minority seeking to raise a voice in councils of government which will determine how they will subsist, and even if they and their children will be able to live at a level of health [illegible]. Cf. United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938); [illegible] v. Hess, 269 F. Supp. 401, 507-8 (D.D.C., 1967); Cook v. Kerner, [illegible], 94-95, (1969). See Brown v. Schwartz, 284 F. Supp.

2011 (D. Conn. 1976).

The foregoing discussion [illegible] the hearing must deal with every aspect of [illegible] environment, living [illegible] level of [illegible], [illegible] school children, education, employment, privacy, etc. It must demonstrate where they have a valid [illegible] at this hearing. They have shown that they will make a [illegible] contribution to the proceedings. In fact, without their participation as parties, the hearing will be [illegible], be a superficial discussion of the issues of non-conformity.

Therefore, we respectfully request that this Court make permanent the heretofore [illegible]

Respectfully submitted,

[illegible] Brenman, Esq., [illegible]
90 Church Street, Room 605
New Haven, Connecticut 06510
Tel: (203) 787-0111

Norman R. Jones, Esq.
P.O. Box D
746 Main Street
Willimantic, Connecticut
Tel: (203) [illegible]

CERTIFICATE OF SERVICE

This is to certify that one copy of the foregoing was mailed via U.S. Mail, postage prepaid, this 27th day of February, 1970, to:

Raymond Bertrand, Esq.
General Counsel
United States Department of Justice
Washington, D.C. 20530

Ozmi Kaufman, Esq.
M. James Spiegel, Jr., Esq.
General Counsel
National Welfare Rights Organization
140 W. 42nd Street
New York, New York

William H. Clendenin, Jr., Esq.

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. [illegible]

ADMINISTRATOR

NOV 14 1969

Dear Mr. Shapiro:

Mr. Neil P. Fallon, Regional Commissioner, SRS, Region I, has brought to my attention seven specific problems in the administration of the Connecticut State Welfare Program which raise questions of compliance with Federal requirements.

It is my understanding that Mr. Fallon and his staff have had extensive negotiations with your staff on these issues; however, the problems have not been resolved.

After careful review of the entire situation, it appears to me that there are serious questions as to whether the respective Connecticut public assistance plans under Titles I, IV (Part A), X, XIV and XIX of the Social Security Act meet requirements of the Federal law and regulations and, therefore, as to the eligibility of Connecticut to continue to receive Federal funds under these titles. Accordingly, pursuant to my authority and responsibility for the administration of Titles I, IV (Part A), X, XIV and XIX of such Act, I hereby notify the Connecticut State Welfare Department that it will have an opportunity for a hearing, as provided for in sections 4, 404 (a), 1004, 1404, and 1904 of the Act and the Federal regulations in 45 CFR 201.6, on the question of the eligibility of the State to continue to receive Federal grants under Title I, IV (Part A), X, XIV, or XIX for the operation of its State plans under the respective Titles. I have set 10:00 a.m. on January 6 , 1970 , at Washington, D. C., as the time and place for the hearing:

We [illegible] to that the following issues will be involved in the hearing:

Three Issues Pertaining to Implementation of Disregard of Income Regulations

1. Aid to Families With Dependent Children - Earnings Exemption

Whether the State's AFDC plan provision for disregarding earned income is in compliance with Section 402 (a)(8)(A)(ii) of the Social Security Act and 45 CFR 233.20 (a)(11)(ii)(b). The State's provision makes the earnings exemption applicable only if AFDC was received for any one of the four preceding months, with the result that an

EXHIBIT A

applicant for AFDC, with income (including earnings) below the assistance standard, does not receive the $30 and 1/3 disregard of earned income until after assistance has been received for a month. The Federal requirements, effective July 1, 1969, are that the first $30 of total earned income for a month, of the individuals specified in such provisions of the law and regulations, plus one-third of the remainder of their earned income for the month must be disregarded.

2. Aid to Families With Dependent Children - Method of Disregarding Earned Income

Whether the State's AFDC plan provision relating to the method of disregarding earned income, which states that for persons to whom the incentive earnings apply (a) deduct expenses of employment, (b) disregard the first $30 per month of earned income and one-third of all additional income earned in the month, is in compliance with 45 CFR 233.20 (a)(7)(i) which requires use of a method under which the applicable amounts of earned income to be disregarded will be deducted from the "gross amount" of earned income, and all work expenses, personal and non-personal, "will then be deducted."

3. Old-Age Assistance and Medical Assistance - Disregard of $2.50 of Any Income of All Old-Age Assistance and Aged Medical Assistance Recipients Except Those Who Are in Institutional Care

Whether the State plan provisions for old-age assistance and medical assistance, which fail to make the $2.50 income disregard otherwise available to OAA and aged MA recipients applicable to those OAA recipients and MA recipients age 65 or older who are in skilled nursing homes, are in compliance with:

(a) Section 2 (a)(10)(A) and (B) of the Social Security Act and 45 CFR 233.20 (a)(3) and (4)(i), under which a State plan for OAA must (1) provide that need and amount of payment will be determined on an objective and equitable basis, and (2) if the State chooses to disregard income from all sources before applying the other provisions for disregarding income, specify the amount that is first to be disregarded per month of any income of an individual claiming assistance.

(b) Section 1902 (a)(17)(B) of the Act and 45 CFR 248.21 (a)(3), under which a State plan for medical assistance, if it includes the medically needy, must provide, that all income and resources (after all State policies governing the disregard of income and resources in the State's approved plans under Titles I, IV-A, X, XIV and XVI have been applied) will be considered in establishing eligibility and payment toward medical assistance costs.

II. All Programs - Absence of Plan Material and Action on Simplified Method for Determination of Eligibility

Whether, because the State agency has failed to submit State plan amendments on a Simplified Method for Determination of Eligibility, the State plans under Titles I, IV (Part A), X, XIV, and XIX of the Social Security Act are in compliance with 45 CFR 205.20 which requires that a State plan for OAA, AFDC, AB, APTD, AABD or MA must provide, effective no later than July 1, 1969, for use of a simplified method of eligibility determination on a test basis in selected local units.

III. AFDC - Eligibility of Children for Aid to Families With Dependent Children When There is an Unrelated Male in the Home

Whether the State's AFDC plan provision which states that where a woman and unrelated male live together, only the woman and her children who are not related to the man may qualify for AFDC, thus excluding the unrelated male, his children and their children from eligibility for AFDC on a basis unrelated to their need, is in compliance with Section 406 (a) of the Social Security Act and 45 CFR 203.1 implementing the Supreme Court decision King v. Smith, and whether it is an arbitrary exclusion inconsistent with the purposes of Title IV-A of the Act.

IV. Title XIX - Inpatient Hospital Services - Absence of Plan Material Providing for Payment of Reasonable Cost

Whether the State plan for medical assistance under Title XIX of the Social Security Act is in compliance with Section 1902 (a)(13)(B) of the Social Security Act and with the Federal regulations in 45 CFR 250.30 and the Handbook of Public Assistance Administration, Supplement B-5300.3. Section 1902 (a)(13)(B) of the Act requires the State plan to include provision for payment of the reasonable cost (as determined

in accordance with standards approved by the Secretary of inpatient hospital services provided under the plan. 45 CFR 250.30 sets forth the standards of the Secretary for determination of reasonable cost. The Handbook, Supplement B-5[illegible], contains the Federal policy setting forth the procedures that the State must use to pay current reasonable costs.

The State agency has failed, since July 1, 1967, to submit the required plan material, and has not implemented the Federal requirements regarding payment of reasonable cost in the following respects:

(1) The State has limited payments to the amount charged to the general public;

(2) The State's position is that the reimbursement rates promulgated by the Hospital Cost Commission include a prospective adjustment factor, retroactive adjustments are not made, and the State has made no showing that retroactive adjustment is not feasible; and

(3) Costs are reduced by omission of certain interest expense and land improvement depreciation.

V. Aid to Families with Dependent Children - Absence of Plan Material for Service Programs for Families and Children

Whether the State plan under Title IV, Part A of the Social Security Act, in light of the State agency's failure to submit Title IV-A and B plan material for Service Programs for Families and Children by April 30, 1969, is in compliance with Section 402 (a) of the Social Security Act and 45 CFR Part 220.

Please let me know if the time set for the hearing is agreeable to you. If your agency would like to have a pre-hearing conference to define the issues further, to explore the possibility of stipulations, or for any other purpose which will contribute to an expeditious resolution of the issues, I shall be glad to cooperate with you in every way.

I shall also be pleased, if you so desire, to discuss informally with representatives of the State the various issues set forth above with the view to a reasonable resolution of the questions involved. A conference with me in my office may be arranged to suit your convenience.

It is my sincere hope that you will give very careful consideration to ways of handling these issues in the future, and that you will find it possible to comply with the federal law and regulations so that it will make unnecessary the hearing on the questions raised by the State plan.

Sincerely,

/s/ Mary E. Switzer

Administrator

Mr. Bernard Shapiro
[illegible], State Welfare Department
[illegible] Avenue
[illegible], Connecticut 06115

[illegible]:WNelson:WPerman:GRabeldg 11/22/60

[illegible] Secretary	Miss Switzer	Mr. Pyle	Mr. [illegible]
[illegible] Under Secretary	Mr. Cohen	Miss Godwin	[illegible]
Mr. Williams	Mr. Simonds	Mr. Nelson	
Mr. Meyers	Mr. Hurley	Mr. Rubel	

EW HAVEN LEGAL ASSISTANCE ASSOCIATION, INC.
169 CHURCH STREET, NEW HAVEN, CONNECTICUT 06510
TELEPHONE AREA CODE 203 • 772-2340

November 28, 1969

The Honorable Robert Finch
Secretary
Department of Health, Education
and Welfare
Washington, D.C.

RE: Conformity Hearing of
January 6, 1970

Dear Sir:

This is to inform you that I represent four welfare rights groups in the New Haven area who are seeking to intervene in the above-scheduled conformity hearing. The groups are the New Haven MOMS, Quinnipiac Welfare Rights Mothers, James and Haven Streets Welfare Rights Mothers, and Farnum Courts Welfare Rights Mothers.

My clients feel that the issues raised in Miss Mary E. Switzer's letter of November 12, 1969, are but a few of the areas in which Connecticut's Plan is not in compliance with the Social Security Act of 1935, as amended. Some of the major issues that my clients would like to raise are:

1. Whether Public Act 299 (1969) is in compliance with Part IV, Handbook of Public Assistance Administration, Sections 5000, 5110, 5120, 5132, 5141. Public Act 299 allows a landlord of a welfare recipient to obtain rental payments directly from the Welfare Department.

2. Whether Section 6 of Public Act 730 (1969) is in compliance with the principle of equitable treatment. Section 6 would deny assistance to children living apart from their other siblings.

3. Whether Section 11 of Public Act 730 (1969) is in compliance with the single state agency require-

EXHIBIT B

ments of the Social Security Act (Sections 2(a)(3), 402(a)(3), 1002(a)(2), 1402(a)(2) and 1902(a)(5), the methods of administration requirements (sections (2)(a)(5), 402(a)(5), 1002(a)(5), 1402(a)(5) and 1902(a)(4) and the confidentiality requirements (Sections 2(a)(7), 402(a)(9), 1002(a)(9), 1402(a)(9) and 1902(a)(7). These same questions of compliance are raised by Public Act 306 (1969). Because the Connecticut State Welfare Department must immediately refer all overpayments to the Central Collections Division, questions arise on the possible interference by the Division with the fundamental responsibility of the single state agency in determining need and paying assistance. See 45 C.F.R. 233.20(a)(3)(ii)(d).

Furthermore because the responsibility for referral of cases for prosecution for fraud is placed with the Central Collections Division, serious questions of compliance with Part IV Handbook, Sections 2620 and 2634 arise.

4. Whether Section 9 of Public Act 730 (1969) is in compliance with Section 402(a)(8) of the Social Security Act and 45 C.F.R. 233.20.

5. Whether the Connecticut State Welfare Department's clothing standards comply with section 402(a)(23) of the Social Security Act.

6. Whether the Connecticut State Welfare Department's intake procedures which allow AFDC applications to be pending for more than thirty days are in compliance with Section 402(a)(10) of the Social Security Act and Part IV, Handbook, Section 2200.

7. Whether the Connecticut State Welfare Department's practice of not rendering fair hearing decisions within 30 days after the hearing is in compliance with Section 402(a)(4) of the Social Security Act and Part IV, Handbook, Section 6200.

8. Whether the Connecticut State Welfare Department's standard of need and level of benefits constitute reasonable standards in compliance with Section 401, 402(a)(23) of the Social Security Act and 45 C.F.R. 233.20.

Because there are other issues concerning Connecticut's compliance with federal law and because Public Act 730 has not been fully implemented, my clients feel that the hearing and the resulting decision should be limited to the issues raised at the hearing and in no way be viewed as approving the entire Connecticut program. This limita-

tion is important because several areas of Connecticut's Plan are currently under litigation.

It is crucial that we receive a reply to this request immediately so that we can participate in the negotiations leading up to the hearing and properly prepare for the hearing.

Very truly yours,

William H. Clendenen, Jr.
Attorney-at-Law

WHC:jc

Tolland-Windham Legal Assistance Program, Inc.

746 MAIN STREET — POST OFFICE BOX D
WILLIMANTIC, CONNECTICUT 06226
Telephone 423-8425

Director
Bruce Berwald

Staff Attorneys
Robert G. Viets
Robert J. Kelleher
Norman K. Janes
Richard J. Mandell

Branch Offices

35 VILLAGE STREET
POST OFFICE BOX 358
ROCKVILLE, CONN. 06066
Phone 872-0553

ONE CENTER STREET
POST OFFICE BOX 322
DANIELSON, CONN. 06239
Phone 774-0455

December 12, 1969

The Honorable Robert Finch
Secretary
Department of Health, Education, and Welfare
Washington, D.C.

RE: CONFORMITY HEARING OF
JANUARY 6, 1970

Dear Sir:

This office represents several welfare rights groups in Northeastern Connecticut. Because welfare recipients will be directly affected by the results of the Conformity Hearing which your department has scheduled for the Connecticut Welfare Department, these groups are seeking to intervene in this hearing. The groups are 'Togetherness Is Everyone' and 'Coventry Action Program'.

The major issues which these groups feel ought to be raised are as follows:

1. Whether Public Act 299 (1969) is in compliance with Part IV, Handbook of Public Assistance Administration, Sections 5000, 5110, 5120, 5132, 5141. Public Act 299 allows a landlord of a welfare recipient to obtain rental payments directly from the Welfare Department.

2. Whether Section 6 of Public Act 730 (1969) is in compliance with the prinicpal of equitable treatment. Section 6 would deny assistance to children living apart from their other siblings.

EXHIBIT C

REPLY TO:

3. Whether Section 11 of Public Act 730 (1969) is in compliance with the single state agency requirements of the Social Security Act [Sections 2 (a)(3), 402 (a)(3), 1002 (a)(2), 1402 (a)(2) and 1902 (a)(5)], the methods of administration requirements [Sections (2)(a)(5), 402 (a)(5), 1002 (a)(5), 1402 (a)(5) and 1902 (a)(4)] and the confidentiality requirements [Sections 2 (a)(7), 402 (a)(9), 1002 (a)(9), 1402 (a)(9) and 1902 (a)(7)]. These same questions of compliance are raised by Public Act 306 (1969). Because the Connecticut State Welfare Department must immediately refer all overpayments to the Central Collections Division, questions arise on the possible interference by the Division with the fundamental responsibility of the single state agency in determining need and paying assistance. See 45 C.F.R. 233.20 (a)(3)(ii)(d).

Furthermore because the responsibility for referral of cases for prosecution for fraud is placed with the Central Collections Division, serious questions of compliance with Part IV, Handbook, Sections 2620 and 2634 arise.

4. Whether Section 9 of Public 730 (1969) is in compliance with Section 402 (a)(8) of the Social Security Act and 45 C.F.R. 233.20.

5. Whether the Connecticut State Welfare Department's clothing standards comply with Section 402 (a)(23) of the Social Security Act.

6. Whether the Connecticut State Welfare Department's intake procedures which allow AFDC applications to be pending for more than thirty days are in compliance with Section 402 (a)(10) of the Social Security Act and Part IV, Handbook, Section 2200.

7. Whether the Connecticut Welfare Department's Fair Hearing practices and procedures meet the requirements of Part IV, Handbook, Section 6000 et.seq.

8. Whether the Connecticut Welfare Department's policy of limiting educational training of recipients to vocational training violates Sections 401 and 402 (a)(15)(A)(i) of the Social Security Act.

9. Whether the Connecticut State Welfare Department's standard of need and level of benefits constitute reasonable standards in compliance with Section 401, 402 (a)(23) of the Social Security Act and 45 C.F.R. 233.20.

Our clients feel that the above are the most important issues that should be raised at the scheduled Conformity Hearing. So that the Department of Health, Education, and Welfare will be able to properly evaluate the Connecticut Welfare program, our clients reserve the right to bring before the Hearing evidence of any other violations of Federal law and policy. Since the Connecticut legislature has recently changed the welfare law and thus raised many questions, the decision which results from this Conformity Hearing should be specifically limited to the issues raised and should not imply approval of policies which are not challenged.

In order that proper preparation for the Hearing can be accomplished it is imperative that formal approval of the intervention of the above named welfare rights groups be given immediately.

Very truly yours,

Norman K. James

Norman K. James

NKJ:elf

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE

DEC 19 1969

Dear Mr. Bander:

In my letter of November 14, 1969, to former Commissioner Shapiro, I apprised him of the hearing scheduled to consider seven specific problems in the administration of the Connecticut State Welfare Program which raise questions of compliance with Federal requirements.

Subsequently, Mr. Neil F. Dillon, Regional Commissioner, SSA, Region I, brought to my attention that he and his staff have had negotiations with your staff about three other problems concerning the State's program which, in addition to those referred to in my November 14, 1969, letter, present questions of compliance that also have not been resolved.

We anticipate that such issues, as set forth below, will additionally be involved in the hearing which, as agreed upon by you and confirmed in Mr. Dillon's letter to you of December 5, is now scheduled for January 29, 1970. (For purposes of the record, these issues are numbered VI, VII, and VIII.)

VI - Aid to Families with Dependent Children - Eligibility of Children for AFDC - Deprived Children

Whether the State's AFDC plan, in the light of section 6 of Public Act No. 731, effective July 1, 1969, is in compliance with section 402(a)(10) of the Social Security Act and the Handbook of Public Assistance Administration, Part IV-2110(a) and (b)(4), and whether it provides for an arbitrary exclusion inconsistent with the purposes of Title IV-A of the Act. Such State law provides, where children are separated from each other and live with relatives in different homes, that AFDC shall not be granted to more than one such family unit, thus excluding similarly situated children from eligibility for AFDC on a basis unrelated to need.

VII - Aid to the Blind - Disregard of Income Provisions - Earned Income Exemption

Whether the State's AB plan with respect to disregarding earned income, in the light of Public Act No. 660, effective June 26, 1969, is in [illegible] Title X (b)(4)(A)

GRADE	SURNAME	DATE	GRADE	SURNAME	DATE

EXHIBIT D

of the Social Security Act and 45 CFR 233.20(a)(10)(i). Such State law requires that in determining the need of a blind individual, the first $150 per month of his earned income plus one-half of the amount thereof shall be disregarded. The provisions of Federal law and regulations limit the earned income that the State shall disregard to $85 per month plus one-half of the earnings in excess of $85 per month.

VIII - Disclosure of Agency Welfare Records Pursuant to Public Act No. 324 and No. 731

Whether the State plans under Titles I, IV (Part A), X, XIV, and XVI of the Social Security Act, in light of Connecticut Public Act No. 324, effective October 1, 1959, and section 11 of Public Act No. 731, effective July 1, 1961, as implemented by Departmental Bulletin No. 2028, relating to access by the State Department of Finance and Control in certain situations of welfare [illegible] Social Security Act, State welfare personnel, and the State Department designated to administer the plans, are in compliance with:

(1) State Public Assistance Manual, Part II, Section 2(a)(2), 2(a)(3), 2(a)(4), and 2(a)(5) of the Social Security Act and Handbook of Public Assistance Administration, Part II-2200 and Supplement B-2120.

(2) Safeguarding of information requirements under sections 2(a)(7), 402(a)(9), 1002(a)(8), 1402(a)(8), and 1602(a)(7) of the Act and Handbook Parts IV-7300, 7310, and 7320, and Supplement B-6520.

Under these regulations, in cases of disclosure of public assistance information by the single State agency to another agency of State government and despite the fact that such other agency is carrying out a function directly connected with the administration of the State plan, the single State agency must have the ultimate authority to make decisions as to whether and what matters within a welfare case record are to be disclosed, and to restrict the information to be disclosed to that which is reasonably necessary to the performance of that function by such other agency.

Under Public Act No. 324 and section 11 of Public Act No. 731, and the Departmental Bulletin No. 2028, the State welfare department is required to afford access to the Department of Finance and Control of the entire record in each welfare case in which said personnel of Finance and Control perform a function described in such plan

provisions and said State Welfare Department is without authority to exercise judgment to restrict the information to be disclosed to that which is reasonably necessary for the particular function to be performed.

As indicated in my letter of November 24, 1969, if your agency would like to have a pre-hearing conference to define the issues further, to explore the possibility of stipulations, or for any other purpose which will contribute to an expeditious resolution of the issues, I shall be glad to cooperate with you in every way.

It is my sincere hope that you will find ways to make it possible for the State to comply with Federal law and regulations, so that it will not be necessary the hearing on any or all of the questions raised by the above plan.

Sincerely,

[illegible]

Administrator

Mr. John P. Lucas
Welfare Commissioner, State
of Illinois Department
Public Welfare Bldg.
Hartford, Connecticut 06115

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
WASHINGTON, D.C. 20201

OFFICE OF THE ADMINISTRATOR

January 22, 1970

Mr. William H. Clendenen, Jr.
Attorney at Law
New Haven Legal Assistance
Association, Inc.
185 Church Street
New Haven, Connecticut 06510

Dear Mr. Clendenen:

I was sorry to learn that you had not received Miss Switzer's letter to Mr. Harder of December 19, 1970, a copy of which is enclosed.

I enjoyed our conversation on Wednesday and would be glad to have further discussions in the future.

Please don't hesitate to contact me if I can be of further assistance.

Sincerely,

Eugene J. Rubel
Special Assistant to
the Administrator

Enclosure

EXHIBIT E

CONNECTICUT
STATE WELFARE DEPARTMENT

September 3, 1969

TO: District Directors

FROM: Commissioner Bernard Shapiro

At a recent meeting of a group of welfare recipients, officials of the State Welfare Department and Governor Dempsey, the Governor expressed concern that some instances of hardship may exist in the matter of back-to-school clothing for children of welfare clients.

In accordance with the Governor's wishes that cases where such hardship may exist be given individual review, all such requests will be handled under the following guidelines established by me as Commissioner of Welfare. If individual questions arise which require further clarification as to whether extraordinary hardship exists, they should be discussed with supervisory authority.

1. All emergency needs of children for school clothing are to be received and reviewed on an individual basis.

2. Monthly clothing allowances are to be fully utilized.

3. Families whose needs have been brought up to welfare quantity standards within the past three months by lump sum payment are to receive no back-to-school clothing allowances.

4. Children who have been employed during the summer and whose incomes have been disregarded are not to receive additional clothing.

5. Families who are benefiting from incentive earnings from employment are not to receive back-to-school clothing.

6. In no instance will the back-to-school allowance for each child assisted be in excess of one payment of $30.00 per child who is otherwise eligible.

7. Families who have not been brought up to standards will receive this consideration if they request provision of the minimum clothing standards.

BS:l

EXHIBIT F